Supreme Court, U.S.
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No. 03144

IN THE
SUPREME COURT OF THE UNITED STATES
MARCH TERM, 2004

ARCHDIOCESE OF MILWAUKEE

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA,

Respondent,

and

ERIC NATHAN PAINO,

Real Party-In-Interest.

On Petition For Writ Of Certiorari To The Court of Appeals,
Fourth District, Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. DOES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT PROHIBIT A STATE FROM EXERCISING SPECIFIC PERSONAL JURISDICTION OVER A NON-RESIDENT RELIGIOUS ORGANIZATION BASED SOLELY ON ITS RELIGIOUS AUTHORITY TO DENY ITS CLERGY THE RIGHT TO EMPLOYMENT BY A SEPARATE RELIGIOUS ORGANIZATION RESIDING IN THE FORUM STATE?

2. DOES THE DUE PROCESS CLAUSE PERMIT THE EXERCISE OF SPECIFIC PERSONAL JURISDICTION OVER A NON-RESIDENT EMPLOYER BECAUSE IT FAILS TO PREVENT OR HINDER AN EMPLOYEE FROM ACCEPTING EMPLOYMENT FROM A SEPARATE FORUM EMPLOYER WHERE IT IS FORESEEABLE THAT THE EMPLOYEE MIGHT COMMIT A SPECIFIC TYPE OF TORT WHILE EMPLOYED BY THE SUBSEQUENT FORUM EMPLOYER?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the Court below: the Superior Court of California, Respondent in this matter as required by California mandamus procedure; Real Party-in-Interest Eric Nathan Paino, an individual living in Orange County, California; the Roman Catholic Bishop of Orange, a Diocese of the Roman Catholic Church incorporated in California; the Archdiocese of Milwaukee, an Archdiocese of the Roman Catholic Church incorporated in Wisconsin; the Estate of Sigfried F. Widera; and Does 1 through 100.

Petitioner, the Archdiocese of Milwaukee, has no parent corporation, and there are no publicly held companies that hold any stock of the Petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF THE BASIS FOR JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

INTRODUCTION 3

STATEMENT OF THE CASE 5

A. Factual Background 5

B. Underlying General Jurisdictional Facts 11

C. Proceedings Below 11

REASONS FOR GRANTING THE PETITION 16

I. CALIFORNIA'S EXERCISE OF PERSONAL JURISDICTION VIOLATES RIGHTS AFFORDED RELIGIOUS INSTITUTIONS BY THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT 16

TABLE OF CONTENTS
(Continued)

Page

II. CALIFORNIA'S EXERCISE OF SPECIFIC PERSONAL JURISDICTION OVER THE MILWAUKEE ARCHDIOCESE CANNOT BE RECONCILED WITH THE REQUIREMENTS OF DUE PROCESS 20

A. A Non-Resident Defendant Employer is not Subject to Personal Jurisdiction Under the Calder "Effects" Test Where it Allegedly Fails to Take Appropriate Steps to Prevent a Potential Future Tort in the Forum by a Former Employee Over Whom the Defendant Has No Control 20

B. The Exercise of Personal Jurisdiction by the State of California Does Not Comport With Fundamental Fairness or Substantial Justice 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Archdiocese of Milwaukee v. Superior Court 112 Cal. App. 4th 423, 5 Cal. Rptr. 3d 154 (2003) ..... passim

Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987) 13, 24

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 13, 21, 25, 27

Calder v. Jones, 465 U.S. 783 (1984) ..... passim

Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929) 19

Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408 (1984) 25

Kedroff v. St. Nicholas Cathedral of Russian O. Church, 344 U.S. 94 (1952) 19

Kulko v. Superior Court, 436 U.S. 84 (1978) 25

Moran v. Metropolitan District Council of Philadelphia and Vicinity, 640 F. Supp. 430 (E.D. Pa. 1986) 26

Pritzlaff v. Archdiocese of Milwaukee, 194 Wis. 2d 302, 533 N.W.2d 780 (1995) 13

Randi W. v. Muroc Joint Unified Sch. Dist., 14 Cal. App. 4th 1066, 929 P. 2d 582 (1997) 4

Richelle L. v. Roman Catholic Archbishop of San Francisco, 106 Cal. App. 4th 257, 130 Cal. Rptr. 2d 601 (2003) 13

Serbian Eastern Orthodox Diocese of America and Canada v. Milivojevich, 426 U.S. 696 (1976) 19

Watson v. Jones, 80 U.S. 879 (1871) 18

Wisconsin v. Yoder, 406 U.S. 205 (1972) 19

TABLE OF AUTHORITIES
(Continued)

Page

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 25

STATUTES

28 U.S.C. §1257(a) 2

California Code of Civ. Proc. §410.10 2

OTHER AUTHORITIES

Former Employer's or Supervisor's Tort Liability to Prospective Employer or Third Person for Misrepresentation or Nondisclosure in Employment Reference, 68 A.L.R. 5th 1 (2003) 4

James T. O'Reilly & Joan M. Strasser, *Clergy Sexual Misconduct: Confronting The Difficult Constitutional And Institutional Liability* Issues, 7 St. Thomas L. Rev. 31, 44 (1994) 18

Liability of Church or Religious Organization for Negligent Hiring, Retention, or Supervision of Priest, Minister or Other Clergy Based on Sexual Misconduct, 101 A.L.R. 5th (2003) 12

Supreme Court Rule 10(c) 2

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
MARCH TERM, 2004

ARCHDIOCESE OF MILWAUKEE

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA,

Respondent,

and

ERIC NATHAN PAINO,

Real Party-In-Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOURTH DISTRICT, OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

Petitioner, the Archdiocese of Milwaukee, (hereinafter "Milwaukee Archdiocese") respectfully moves this Honorable Court to issue a writ of *certiorari* to review the published opinion of the California Court of Appeals entered on October 1, 2003, and the California Supreme Court Decision on January 14, 2004 denying the Archdiocese's Petition for Review.

OPINIONS BELOW

The opinion of the California Court of Appeals, 4th District, affirming the trial court's exercise of personal

jurisdiction over the Milwaukee Archdiocese is officially reported at 112 Cal. App. 4th 423, 5 Cal. Rptr. 3d 154 (2003), and appears in Petitioner's Appendix at A-1 through A-29. The California Supreme Court, in an unpublished order, denied the Archdiocese's Petition For Review. That denial appears in Petitioner's Appendix at B-1.

STATEMENT OF THE BASIS FOR JURISDICTION

1. The opinion of the California Court of Appeals sought to be reviewed was rendered on October 1, 2003.

2. Petitioner's timely Petition For Review to the California Supreme Court was denied on January 14, 2004.

3. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257(a) and Rule 10(c), Rules of the Supreme Court of the United States, in that California's exercise of jurisdiction over the Milwaukee Archdiocese violates the Free Exercise Clause of the First Amendment to the United States Constitution, and is incompatible with this Court's decisions regarding the minimum contacts necessary to establish specific personal jurisdiction over a non-resident defendant in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There are no federal statutes at issue in this Petition. This Petition questions California's exercise of personal jurisdiction over the Milwaukee Archdiocese consistent with the First and Fourteenth Amendments to the United States Constitution, and *California Code of Civ. Proc. §410.10.*

INTRODUCTION

This case questions whether the Free Exercise Clause of the First Amendment prohibits a state from exercising specific personal jurisdiction over a non-resident religious organization predicated upon its failure to prevent a member of its clergy from pursuing his/her vocation with a separate and distinct religious organization located in the forum state. Petitioner, the Milwaukee Archdiocese, respectfully submits that where the non-resident religious organization has no legal ability to prevent such prospective employment, but only the religious authority to do so, a State may not, consistent with the Free Exercise Clause, impose personal jurisdiction over the non-resident religious organization.

The California Court of Appeals held that even though the Milwaukee Archdiocese could not legally prevent its priest, Sigfried Widera, previously convicted in 1973 of a sexual molestation offense in Wisconsin, from resigning his affiliation with the Milwaukee Archdiocese in 1981, and accepting employment with a separate and distinct California religious organization, the Archdiocese did have the ecclesiastical authority to prevent that employment under the religious doctrine of "excardination," requiring the Archdiocese to approve Widera's new employment with a foreign diocese. The court then held that the Archdiocese's failure to prevent Widera's employment with the Diocese of Orange constituted "purposeful availment" of California's laws under the "effects" test for determining a state's constitutional exercise of specific personal jurisdiction, established in *Calder v. Jones*, 465 U.S. 783 (1984), which permits the exercise of jurisdiction over a non-resident defendant where it engages in intentional and potentially harmful conduct expressly aimed at, or targeting, the forum state.

A second issue posed by this case is whether the *Calder* "effects" test permits the exercise of jurisdiction over a non-resident employer who is alleged to have wrongfully failed to prevent or deter a wrong subsequently committed in the forum by a former employee acting in his/her capacity as an employee of a subsequent forum employer. According to the California Court of Appeals, the "intentional conduct" requirement in *Calder* includes not only affirmative acts expressly aimed at or targeting the forum, but it also includes a non-resident's failure to prevent or hinder a third party from potentially committing a future wrong in the forum.

The California Court of Appeals held that the Archdiocese's failure to prevent Widera's employment by the Diocese of Orange satisfied the "effects" test, because the Archdiocese should have foreseen a repeat of Widera's prior sexual offense after becoming an employee of the Diocese of Orange. The court also held that while not necessary to establish personal jurisdiction over the Archdiocese, its failure to inform the Diocese of Orange about Widera's 1973 criminal conviction facilitated Widera's employment by the Diocese of Orange, and this omission also satisfied the *Calder* "effects" test.[1] According to the Court of Appeals, any non-resident former employer that fails to disclose all material information regarding a former employee in the course of recommending the former employee to a prospective employer in California, knowing the former employee poses a distinct risk of harm to

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[1] Under California common law, any employer that voluntarily provides a prospective employer with information relating to its former employee must make full and complete disclosure of all material information regarding the former employee. See *Randi W. v. Muroc Joint Unified Sch. Dist.*, 14 Cal. App. 4th 1066, 1081-82, 929 P. 2d 582 (1997). Notably, there is a split of authority on this issue. See "Former Employer's or Supervisor's Tort Liability to Prospective Employer or Third Person for Misrepresentation or Nondisclosure in Employment Reference," 68 A.L.R. 5th 1 (2003).

California residents, is subject to specific personal jurisdiction in California under the *Calder* "effects" test.

Petitioner respectfully submits that the *Calder* "effects" test cannot be distorted to encompass this type of inaction by a non-resident former employer; Due Process requires more than the non-resident's failure to take action to prevent possible future harm from occurring in the forum, at least where, as here, the potential harm is posed by a third party over whom a non-resident no longer has any control. The *Calder* "effects" test, at a minimum, requires some affirmative conduct by a non-resident defendant that specifically targets the forum, where the defendant can or should foresee potential harm to forum residents arising from that affirmative conduct. A non-resident's failure to act to prevent a potential harm from occurring in the forum by a third party cannot form the predicate for the state's exercise of specific personal jurisdiction over the non-resident consistent with Due Process.

STATEMENT OF THE CASE

A. Factual Background.

In 1967, Sigfried Widera was canonically incardinated[2] within the Milwaukee Archdiocese and received faculties to act as a priest in Wisconsin. 112 Cal. App. 4th at 427. Approximately six years later, Widera was criminally convicted of sexual molestation of a minor and sentenced to probation. *Id.* On June 29, 1976, another minor in Wisconsin claimed he was sexually assaulted by Widera. *Id.* at 428.

[2] Incardination is an ecclesiastical process whereby a priest is formally assigned to a Bishop in a specific diocese or Archdiocese. 112 Cal. App. 4th at 427, n. 1.

In August, 1976, Widera told the Milwaukee Archdiocesan Personnel Board that he planned to visit his brother in Costa Mesa, California. *Id.* at 429. In October, 1976, after spending several months in Costa Mesa, Widera informed the Board that he was considering asking for a leave of absence, or working for a California parish. The Personnel Board responded that the Milwaukee Archdiocese would be amenable to Widera's continuing to work within the Archdiocese after his obtaining significant psychiatric counseling, or it would consider releasing Widera to the services of another diocese if that could be arranged, and Widera agreed to continue counseling. The Board noted that the latter course would require permission from the Archbishop of Milwaukee, as well as the Bishop of the diocese selected by Widera.[3] Widera responded that "The choice of being released to the service of another diocese has its merits." *Id.* at 430.

On December 3, 1976 the Archbishop of Milwaukee informed the Archdiocesan Personnel Board that Widera wished to work temporarily for the Diocese of Orange and that he would be continuing psychotherapy in California. The Archbishop informed the Board that he planned to contact Bishop William Johnson of the Diocese of Orange to see if there might be something available for Widera. *Id.*

In a letter dated December 20, 1976 the Archbishop of Milwaukee wrote to Bishop Johnson and Father Michael Driscoll, the secretary/chancellor of the Diocese of Orange:

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[3] As dictated by the hierarchal structure of the Roman Catholic Church, the religious authority of the Milwaukee Archdiocese is limited to Wisconsin; if Widera wished to work as a Roman Catholic priest elsewhere, he would need authorization from the Archbishop of Milwaukee, as well as the Bishop of the selected diocese. *Id.* at 430.

A few days ago I talked by phone to Bishop Johnson about a possible pastoral assignment for Father Sigfried Widera of this Archdiocese. The conversation was very general and the Bishop suggested that perhaps something could be done on a temporary basis. My reason for approaching Bishop Johnson is founded in the fact that Father Widera's brother and family live in Costa Mesa, California....

Father Widera was ordained in 1967 and has done good work for the Diocese in the places to which he was assigned. In his earlier years there was a moral problem having to do with a boy in school. This seemed adequately confronted through treatment and an intense desire upon Father's part to avoid any repetition of a previous offense.

More recently, however, there has been a repetition, and according to our State Law further psychiatric treatment is mandated with the strong recommendation that no immediate assignment be made in the environs of the Archdiocese.

Father Widera has cooperated in every way and is presently under treatment. His doctor is somewhat in favor of his leaving the scene but expects that there

> will be continuing treatment. This has already been arranged and a doctor in California will take over at this point. From all the professional information I can gather there would seem to be no great risk in allowing this man to return to pastoral work, but there are legal complications at present writing. Incidentally, these legal technicalities would permit Father's going to another State as long as treatment is continued.
>
> There is no thought of incardination involved, and I'm quite willing to accept the man back into the Archdiocese whenever circumstances would indicate. Though I anticipate no recurrence of this past aberration, I would certainly want to be informed if the slightest suspicion were to develop. I would like to show fraternal charity to a fellow priest, but I cannot be virtuous at the expense of a fellow Bishop.

Id. at 430-31.

On January 10, 1977 Widera was appointed by the Diocese of Orange as an Associate Pastor "in hospitality" at St. Pius V Parish in Buena Park, California. *Id.* at 431. Father Driscoll wrote to the Archbishop of Milwaukee confirming the appointment. In response, the Archbishop wrote to Bishop Johnson informing him that Widera would remain a member of the Milwaukee Archdiocese:

> Permit me to express my sincere thanks to you and those involved for this consideration of a priest who has done good work and whose absence from the Diocese is predicated upon the local situation discussed in earlier letters.
>
> I fully expect that upon the recommendation of those professionally helping him at the present time he will be reassigned in our Archdiocese.

Id.

Beginning in January, 1977, with Widera's appointment as Associate Pastor at St. Pius V Parish in Buena Park, the Diocese of Orange began paying Widera's salary and provided for his temporal needs. After this date, Widera acted on behalf of the Diocese of Orange, which had complete control over his assignments and supervision; although Widera continued to be incardinated with the Milwaukee Archdiocese until 1981, upon receiving his assignment in California from the Diocese of Orange, all responsibilities to and for Widera were placed upon the Diocese of Orange as if Widera were incardinated there. (PA 00952 at 35:20-25, 36:1).[4]

While the Diocese of Orange assumed all responsibilities for Widera in the period 1977 through 1981,

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[4] As explained by the Bishop of the Diocese of Orange, it is not unusual that a priest will remain incardinated in one diocese even when working in another diocese and that it is customary for a priest to have worked "at least three years" and "received two assignments before [the new diocese] consider(s) incardinating the priest." (PA 00933 at 67:1-13).

because Widera remained incardinated by the Milwaukee Archdiocese, as a matter of Canon Law, he was still subject to the authority of the Archbishop of Milwaukee. The Archbishop had the authority to recall Widera to Wisconsin, to remove his faculties as a priest, to investigate whether he had committed acts of molestation, and to petition the Pope to laicize him. 112 Cal. App. 4th at 432.

Widera worked at St. Justin Martyr Parish in Anaheim, California from April, 1997 to July, 1981. Widera was then transferred to St. Edward's Parish in Dana Point, California because the policy of the Diocese of Orange was to rotate associate pastors every four years. *Id.*

In October, 1981 Widera sought incardination into the Orange Diocese. Under Canon Law, a diocesan priest cannot be incardinated in two dioceses at the same time. The proper canonical process was to excardinate Widera from the Milwaukee Archdiocese and to incardinate him into the Orange Diocese. Once a diocesan priest becomes incardinated in a new diocese, his relationships, obligations, and connections with the former diocese are terminated. *Id.* At such time, the former diocese no longer has any authority over the priest, and has no right to restrict or terminate his activities as a priest. (PA 00966).

Widera was excardinated from the Milwaukee Archdiocese and incardinated in the Orange Diocese on November 23, 1981. As of this date, Widera was removed from the Milwaukee Archdiocesan priest fund, personnel role, pension plan, priest senate, and payroll; as of this date, there was no longer any legal relationship between Widera and the Milwaukee Archdiocese. 112 Cal. App. 4th at 432.

After incardination in the Orange Diocese, Widera worked at several parishes until he was assigned to St. Martin

de Porres in Yorba Linda, California in July, 1985. Real party-in-interest, Eric Paino, attended St. Martin de Porres. The incident giving rise to the underlying litigation is Paino's claim that shortly after Widera came to St. Martin de Porres, he began molesting Paino. *Id.* at 433.

B. Underlying General Jurisdictional Facts.

The Milwaukee Archdiocese is a religious corporation organized under Wisconsin's law and is located in Milwaukee, Wisconsin. (PA 00003 at ¶3). It is a separate, distinct corporate entity from the Diocese of Orange which is incorporated in California. (*Id.*, ¶2). Both entities keep separate books, and only the Diocese of Orange has a presence in California. *Id.*

The Milwaukee Archdiocese is presided over by a different Bishop or Archbishop than the Diocese of Orange. The Archbishop of Milwaukee exercises no control or influence over any activities in the Diocese of Orange. (PA 00062, ¶¶2-3). The Milwaukee Archdiocese owns no real or personal property in California, pays no California taxes, holds no California bank accounts, maintains no California offices, has no California telephone listings or mailing addresses, and has no registered agent for the service of process in California. *Id.* It also has not signed any contracts in California, nor has it performed any religious services, sold any goods, or derived any substantial revenue from goods used or consumed in California. *Id.* The Milwaukee Archdiocese conducts no business in California. *Id.*

C. Proceedings Below.

In April, 2002, Paino filed a complaint against the Orange Diocese, the Milwaukee Archdiocese, and Widera, asserting eleven causes of action based upon alleged acts of

sexual abuse by Widera occurring in California in 1985. Paino alleged that:

> Even though the Defendants Dioceses knew and should have known that Father Widera had molested and sexually abused minors, and even though the Defendants Dioceses had actual and constructive knowledge of the molestations and sexual abuses, the Defendants Dioceses covered up the molestations and abuses by Father Widera, continued to allow Father Widera to act as a Catholic priest within the Defendants Dioceses, continued to hold Father Widera out as a Catholic priest who could be trusted with minor parishioners and minor students, continued to allow Father Widera to work with minor parishioners and minor students on a daily basis, and continued to move Father Widera around to different Catholic churches within the Defendants Dioceses.

114 Cal. App. 4th at 433.[5]

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[5] The essence of the cause of action asserted against the Milwaukee Archdiocese and the Diocese of Orange is that each wrongfully failed to terminate Widera because he was unfit to be a priest. Courts are divided on the issue of whether the Free Exercise Clause permits a civil tort action against a religious institution for failing to terminate or adequately supervise a member of its clergy. See "Liability of Church or Religious Organization for Negligent Hiring, Retention, or Supervision of Priest, Minister or Other Clergy Based on Sexual Misconduct," 101 A.L.R. 5th (2003). The Supreme Court of Wisconsin has held that there is no such tort liability under the First

The Milwaukee Archdiocese moved to quash the action for lack of personal jurisdiction; the trial court denied the Archdiocese's motion. The Archdiocese then filed a Petition For Writ of Mandate challenging the trial court's order. *Id.* In a Decision dated October 1, 2003, the California Court of Appeals affirmed the trial court's decision, holding that while California did not have "general jurisdiction" over the Milwaukee Archdiocese, i.e., the Archdiocese had no "substantial ... continuous and systematic contact with California," it did have "specific jurisdiction" because: (1) the Milwaukee Archdiocese had "purposefully availed itself of forum benefits with respect to the matter in controversy," (2) the controversy was "related to or arose out of the Archdiocese contacts with the forum," and (3) the exercise of jurisdiction "comported with fair play and substantial justice." *Id.* at 435-36, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 476 (1985).

The Court then held that under *Calder v. Jones*, 465 U.S. 783 (1984) and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), the "purposeful availment" standard is met where a non-resident defendant purposefully directs or aims its actions toward the forum state, knowing that its conduct could potentially cause harm to forum residents. The Court found the "effects" test satisfied here:

Amendment. See *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 533 N.W.2d 780 (1995). The California appellate courts have not resolved this issue. See *Richelle L. v. Roman Catholic Archbishop of San Francisco*, 106 Cal. App. 4th 257, 130 Cal. Rptr. 2d 601 (2003). Because this issue is a "merits" issue and not a jurisdictional one, it is not ripe for determination by this Court. See *Calder v. Jones*, 465 U.S. 783, 790 (1984).

> The evidence supports the conclusion the Milwaukee Archdiocese intentionally sent Widera to California to get him out of Wisconsin where he had been convicted of sexual perversion. . .and could create further problems for the Milwaukee Archdiocese. . .[T]he Milwaukee Archdiocese knew Widera was a pedophile and posed a serious threat of sexually abusing boys in California .... Having sent Widera into California knowing he was a convicted child abuser and a pedophile, the Milwaukee Archdiocese reasonably could expect to be haled into court in California to answer for the consequences of its actions.
>
> Once Widera was in California, the Milwaukee Archdiocese never recalled him, although it had the power to do so, never questioned him, never monitored his treatment, and never conducted an investigation to determine whether he continued to molest boys. The Milwaukee Archdiocese allowed Widera to be excardinated so he could be incardinated in the Orange Diocese.

Id. at 438-39.

Although the court found that the Milwaukee Archdiocese's religious authority to prevent Widera's 1981 employment by the Diocese of Orange was sufficient to satisfy

the "effects" test,[6] the court also concluded that jurisdiction could be predicated on the Archdiocese's failure to disclose Widera's 1973 criminal conviction to the Diocese of Orange:

> "Is it relevant to the "effects" test whether or not the Milwaukee Archdiocese disclosed Widera's prior misconduct to the Diocese of Orange? No. The Milwaukee Archdiocese rid itself of Widera by sending him into California, knowing he was a pedophile and had been convicted of perversion with a boy. The Milwaukee Archdiocese's conduct was intentional and was expressly aimed at California. The Milwaukee Archdiocese knew its intentional conduct would cause harm in California. Thus, the Milwaukee Archdiocese's conduct satisfied the "effects" test, regardless of whether it gave Orange Diocese "fair warning" of Widera's prior misconduct.
>
> Even if considered, [the Milwaukee Archdiocese letter] ... supports the conclusion the Milwaukee Archdiocese engaged in express aiming at or targeting California. The

[6] While the court stated that the Archdiocese "sent" Widera to California in 1976 (which is manifestly untrue, see pages 16-17 infra.), and permitted him to work as a temporary or "loaned" employee with the Diocese of Orange in the period 1977-1981, none of these "facts" is jurisdictionally relevant because the wrong at issue here, the alleged 1985 molestation of plaintiff by Widera, occurred four years after Widera became employed (incardinated) by the Diocese of Orange. Whatever the Milwaukee Archdiocese did or did not do before 1981 is jurisdictionally irrelevant.

> letter appears to be intentionally vague and incomplete; it does not describe what is meant by 'a moral problem,' does not disclose when the 'moral problem' occurred, does not identify the repetition, and, most importantly, does not disclose Widera's criminal conviction for sexual perversion.

112 Cal. App. 4th at 439-440.

REASONS FOR GRANTING THE PETITION

I. CALIFORNIA'S EXERCISE OF PERSONAL JURISDICTION VIOLATES RIGHTS AFFORDED RELIGIOUS INSTITUTIONS BY THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

If the Milwaukee Archdiocese had actually sent Widera to California in 1976, and if Widera had committed the alleged offense against plaintiff while still an employee of the Milwaukee Archdiocese, California's exercise of jurisdiction over the Milwaukee Archdiocese likely would pose no constitutional issue. But that is not what occurred here. First, the Milwaukee Archdiocese did not "send" Widera to California. The lengthy correspondence quoted by the California Court of Appeals, pages 7-9 *supra*, discloses that Widera first had the idea of moving the California and seeking temporary association with a California diocese, that Widera was free to seek a "temporary assignment" anywhere in the United States with the approval of the Milwaukee Archdiocese, that Widera chose California because he had family there, that Widera sought permanent employment with the Diocese of Orange, and that the Milwaukee Archdiocese had no legal or

ecclesiastical power to require the Diocese of Orange, or any other diocese, to employ Widera in any capacity.

Second, even if the Milwaukee Archdiocese had "sent" Widera to California in 1976, thereby arguably subjecting the Archdiocese to California's exercise of personal jurisdiction for any wrong committed by Widera while still employed by the Milwaukee Archdiocese, i.e., as a "loaned" employee with the Diocese of Orange,[7] that employment undisputedly ended in November, 1981 when the Milwaukee Archdiocese excardinated Widera and the Diocese of Orange incardinated him. Because the alleged offense giving rise to the cause of action at issue in this case occurred in 1985, California's exercise of jurisdiction over the Milwaukee Archdiocese is necessarily predicated upon the Archdiocese's "complicity" in permitting Widera to become a permanent employee of the Diocese of Orange, thereby allegedly exposing California juveniles to an increased risk of harm from Widera while acting as a priest permanently employed by the Orange Diocese. It is this alleged wrongful failure to prevent Widera's employment by the Diocese of Orange that collides with the First Amendment's Free Exercise Clause.

It is undisputed that when Widera sought permanent employment with the Diocese of Orange, the Milwaukee Archdiocese had no legal right to foreclose that employment, and that after Widera became an employee of the Diocese of Orange in 1981, the Milwaukee Archdiocese no longer had any legal relationship to Widera—it had no right to supervise or discipline Widera, nor did it have any right to restrict or terminate his activities as a priest. None of this mattered to the

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[7] The California Court of Appeals analogized Widera's status to that of a "loaned employee" in the years 1977-1981, when only the Diocese of Orange was directing Widera's employment and supervising him while Widera continued to be incardinated in Wisconsin. 114 Cal. App. 4th at 438.

California Court of Appeals, however, because under Roman Catholic religious doctrine, i.e., Canon Law, the Diocese of Orange would not employ Widera absent his being excardinated from the Milwaukee Archdiocese. Accordingly, although the Milwaukee Archdiocese had no legal right to prevent that employment, its religious authority to do so was sufficient to permit California to exercise jurisdiction over the Archdiocese.

Can the state of California exercise specific personal jurisdiction over a religious institution or organization because, as a matter of religious doctrine, as opposed to civil legal authority, it can prevent an allegedly unfit member of its clergy from becoming employed by a separate and distinct religious organization incorporated in the forum state? Petitioner respectfully submits that the First Amendment precludes the exercise of personal jurisdiction in such a case. The Archdiocese's exercise of its religious authority, i.e., its excardination of Widera, in 1981, cannot justify California's exercise of specific personal jurisdiction.[8]

Thomas Jefferson wrote in 1808 that the government is interdicted by the Constitution from intermeddling with religious institutions, their doctrines, disciplines or exercises. James T. O'Reilly & Joan M. Strasser, *Clergy Sexual Misconduct: Confronting The Difficult Constitutional And Institutional Liability Issues*, 7 St. Thomas L. Rev: 31, 44 (1994). Sixty-three years later, this Court in *Watson v. Jones*, 80 U.S. 879 (1871), found that civil courts have no jurisdiction when the matter in dispute is "ecclesiastical in character", or where the matter concerns "theological controversy, church discipline, or ecclesiastical government." *Id.* at 733.

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[8] Although the Milwaukee Archdiocese argued that its religious authority over Widera could not provide California with a basis for the exercise of jurisdiction consistent with the First Amendment, the Court of Appeals ignored this issue.

Subsequently, the Court held that it is the function of church authorities, not civil courts, to assess the qualifications of clergy and act upon such an assessment. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929). More recently, the Court held that decisions based upon religious doctrine and policy, such as the selection and utilization of clergy "have federal constitution protection as part of the free exercise of religion against state interference." *Kedroff v. St. Nicholas Cathedral of Russian O. Church*, 344 U.S. 94, 116 (1952).

The Court also discussed church autonomy in *Serbian Eastern Orthodox Diocese of America and Canada v. Milivojevich*, 426 U.S. 696 (1976), finding that a Bishop could not seek redress in a civil court to challenge his defrockment because the First Amendment precludes civil courts from delving into the interpretation of church governance in order to decide legal issues. *Id.* at 708-709. Specifically, the Court found that when resolution of a dispute requires extensive inquiry by a civil court into religion and polity, the First and Fourteenth Amendments mandate that civil courts cannot disturb the decisions of an ecclesiastical tribunal, but must accept such decisions as binding. *Id.* at 709; *see also Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that it would be unconstitutional for the state of Wisconsin, as *parens patriae*, to compel mandatory education of Amish children because it would require a threshold inquiry by the court into a deeply rooted religious belief).

Reliance upon Canon Law, or religious doctrine, to support a finding of specific personal jurisdiction raises the same kinds of First Amendment problems, involving the court's application of religious doctrine rather than principles of civil law, to sustain jurisdiction over a non-resident religious institution. The ability of one religious organization to prevent a member of its clergy from assuming employment with a

separate and distinct religious organization located in the forum cannot provide the basis for the exercise of specific personal jurisdiction where that ability derives from the former's religious authority or control rather than its legal authority/control. Because the Milwaukee Archdiocese had no such legal authority or control over Widera's employment by the Diocese of Orange, and because it had no control whatsoever over Widera at the time of his alleged wrongdoing, California cannot constitutionally base its exercise of jurisdiction on the Archdiocese's 1981 excardination of Widera in order to permit his incardination by the Diocese of Orange. California may not, consistent with the First Amendment, hale the Archdiocese into California's courts to answer for a wrong committed by its former priest four years later, while employed, supervised, and controlled by the Diocese of Orange.

II. CALIFORNIA'S EXERCISE OF SPECIFIC PERSONAL JURISDICTION OVER THE MILWAUKEE ARCHDIOCESE CANNOT BE RECONCILED WITH THE REQUIREMENTS OF DUE PROCESS.

A. A Non-Resident Defendant Employer is not Subject to Personal Jurisdiction Under the *Calder* "Effects" Test Where it Allegedly Fails to Take Appropriate Steps to Prevent a Potential Future Tort in the Forum by a Former Employee Over Whom the Defendant Has No Control.

Assuming, *arguendo*, that in order to establish specific personal jurisdiction, a state may, consistent with the First Amendment, rely upon a non-resident religious institution's religious authority to prevent a member of its clergy from becoming employed by a separate and distinct religious

institution within the forum, does this ability permit the state to exercise jurisdiction over the non-resident former employer under the Due Process Clause of the Fourteenth Amendment? The California Court of Appeals said yes—that a non-resident employer of a individual allegedly unfit for employment by a subsequent forum employer can be subjected to personal jurisdiction in the forum where its failure to prevent or hinder the subsequent employment creates a foreseeable risk of future harm to forum residents, perpetrated by the former employee acting in his capacity as an employee of the subsequent forum employer. The Court of Appeals held that it was jurisdictionally irrelevant that the non-resident former employer has no control or tie to the former employee when he/she commits a wrong in the forum while an employee of the subsequent forum employer.

Petitioner respectfully submits that neither *Calder* nor any other decision of this Court permits jurisdiction to attach in such a case; Due Process does not permit a state to exercise jurisdiction simply because a non-resident allegedly fails to prevent possible future harm in the forum caused by a third party over whom the non-resident no longer has any control or other legal relationship.

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 474-78 (1985), the Court reviewed the requirements for a state's exercise of specific personal jurisdiction over a non-resident defendant:

> "The Due Process clause protects and individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' ....by requiring that individuals have 'fair warning that a

particular activity may subject them to the jurisdiction of a foreign sovereign'.

Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum...and the litigation results from alleged injuries that 'arise out of or relate to' those activities.... (citations omitted)....

[T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state.... [T]he Court has consistently held that ... foreseeability [of causing injury] is not a 'sufficient benchmark' for exercising personal jurisdiction.... Instead, 'the foreseeability that is critical to due process analysis is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into Court there.' (Citations omitted)....

This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as the result of 'random,' 'fortuitous,' or 'attenuated' contacts ...

> or the 'unilateral' activity of another party or a third person ....
>
> Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'... [M]inimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities."

In *Calder, supra*, the Court applied these principles of Due Process to a case involving a professional entertainer residing in California who brought an action in California Superior Court claiming that she had been libeled in an article written and edited by defendants residing in Florida, and published by the National Enquirer, a national magazine having its largest circulation in California. This Court held that where a non-resident defendant is the "primary participant" in alleged wrongdoing intentionally directed at a California resident, specific jurisdiction over the non-resident is appropriate. The Court emphasized that the non-resident defendants in *Calder* were the primary participants in a wrong actively committed upon a California resident; they were not, as defendants argued, individuals who had no control over the wrong committed simply because the National Enquirer published the article in California, nor could they claim that they did not benefit economically from the wrong they committed.

Nothing could be further from the case here. The Milwaukee Archdiocese, like any other former employer providing references or background information regarding a former employee to a prospective employer, derives no financial benefit from providing the information,[9] nor is the former employer an active wrongdoer simply because it allegedly omits to supply all material information to the prospective employer in the forum. Most importantly, the former employer has no control over the possible commission of future wrongs by the former employee. The primary participant, indeed the only participant, in the subsequent wrongdoing is the former employee, who is under the supervision and control of the subsequent forum employer.

Additionally, the failure to prevent or hinder the commission of a future tort by a former employee does not constitute the "targeting" of forum residents required by the *Calder* "effects" test. In *Asahi Metal Industry Co. v. Superior Court*, 480 US 102 (1987), this Court held that California could not exercise personal jurisdiction over a foreign valve manufacturer who sold valves to an independent third party even when it knew the product would be incorporated into tire tubes sold in California. The Court held that the non-resident defendant's awareness that some of the valves would end up in California was not, in and of itself, enough to show that the defendant purposefully availed itself of the California market. The Court held that the defendant did not specifically "target" California, and thus the exercise of personal jurisdiction by the Superior Court of California exceeded the limits of due process. *Asahi*, 480 US at 113.

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[9] Whatever benefit is derived by the former employee in the forum cannot be imputed to the non-resident former employer. See e.g. *Kulko v. Superior Court*, 436 US 84 (1978), and *Calder*, 465 US at 790.

Here, while the Milwaukee Archdiocese knew that Widera was seeking permanent employment with the Diocese of Orange, and that Widera might pose a risk of harm to California juveniles in his capacity as a priest associated with the Diocese of Orange, such knowledge no more constitutes the "targeting" of forum residents than the conduct of the defendant in *Asahi*. It is undisputed that Widera chose to seek employment with the Diocese of Orange, and that the Milwaukee Archdiocese did not direct Widera to travel to California nor did it direct Widera to seek employment with the Diocese of Orange. Moreover it is undisputed that the Milwaukee Archdiocese had no conceivable reason to encourage Widera to seek employment in California, as opposed to the remaining 48 states. The Archdiocese, like any other employer willing to provide references to a soon to be former employee, would have provided the same information to any other diocese inclined to hire Widera. Widera's selection of California was a unilateral one by a third party which was "random," "fortuitous" and "attenuated" so far as the Archdiocese was concerned. This Court has held that these factors preclude the exercise of jurisdiction over a non-resident. *See Kulko v. Superior Court*, 436 U.S. 84, 93 (1978); *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 417 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980); *Burger King, supra*, 471 U.S. at 475.

Indeed, if the California Court of Appeals correctly applied the *Calder* "effects" test in this case, then any non-resident employer of an employee who might be deemed to be unfit in some way, or to pose some increased risk harm to others, would be subject to personal jurisdiction in any state where the employee later unilaterally chooses to become employed if the non-resident employer facilitates that subsequent employment in any way, such as by failing to make full and complete disclosure of all material information pertaining to the employee in any reference provided to a

prospective employer. Such non-disclosure would always constitute a "targeting" of the forum sufficient to allow a state to exercise specific personal jurisdiction over the non-resident former employer, despite the fact that the former employee unilaterally chose the state in which he/she desired to work in a given employment.

Petitioner submits that personal jurisdiction over non-resident employers cannot, consistent with Due Process, be predicated upon inadequate disclosures or other failures to take steps to prevent or hinder the possibility of a future tort in a given forum committed by prior employees or agents over whom the non-resident has no further control. As the District Court in *Moran v. Metropolitan District Council of Philadelphia and Vicinity*, 640 F. Supp. 430, 434 (E.D. Pa. 1986) appropriately observed: "Omissions can cause tortious harm just as affirmative acts can, but a failure to act presents a less convincing case of purposefully availing oneself of the privilege of conducting activity in the state than an affirmative act with specific foreseeable harm" (holding that an alleged failure to act to prevent tortious harm in the forum by a third party insufficient to satisfy due process). Petitioner respectfully submits that the California Court of Appeals misapplied the *Calder* "effects" test.

B. The Exercise of Personal Jurisdiction by the State of California Does Not Comport With Fundamental Fairness or Substantial Justice.

Even if a non-resident employer's failure to take appropriate action to attempt to hinder or prevent future wrongdoing by a former employee in the forum is sufficient under the *Calder* "effects" test, personal jurisdiction cannot be exercised where it would deprive the non-resident defendant of substantial justice, where the exercise of jurisdiction is

inconsistent with the notions of fair play. See e.g. *Burger King Corp., supra*, 471 US at 477-78, 485-86.

The imposition of jurisdiction in this case means that the State of California would have perpetual jurisdiction over the Milwaukee Archdiocese, or any other non-resident employer alleged to have unreasonably permitted or facilitated its employee's employment by a subsequent forum employer, for any future misconduct by a former employee acting in his capacity as an employee of the subsequent forum employer, regardless of when that alleged misconduct might occur. This exercise of jurisdiction would be permissible despite the fact that the employer no longer exercises any supervision or control over the former employee.[10] Such "perpetual" jurisdiction over a non-resident former employer, who is alleged to have failed to prevent possible future wrongdoing by a former employee, after it relinquishes all rights to supervise and control the actions of that individual, offends traditional notions of fair play and substantial justice.

CONCLUSION

For each of the foregoing reasons, the Milwaukee Archdiocese respectfully asks the Court to grant this Petition for Review.

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[10] For example, under the Court of Appeals holding, the Milwaukee Archdiocese would be required to defend itself against any act of molestation allegedly committed by Father Widera in California while acting as a priest for the Diocese of Orange, even if that act occurred 10, 20 or 30 or more years after the Archdiocese terminated any and all legal relationship with Widera, and no longer had any authority to control, supervise or terminate him.

Respectfully submitted this 13th day of April, 2004.

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APPENDIX

California Court of Appeal, 4th Circuit, Division 3 Decision, Dated October 1, 2003, denying Petitioner's Request for Petition for Writ of Mandamus — A1

Supreme Court of California's Order, dated January 14, 2004, denying Petition for Review — B1

H

Court of Appeal, Fourth District, Division 3, California.

The ARCHDIOCESE OF MILWAUKEE, Petitioner,
v.
The SUPERIOR COURT of Orange County, Respondent,
Eric Nathan Paino, Real Party in Interest.

No. G031386.

Oct. 1, 2003.
Review Denied Jan. 14, 2004.

Background: Alleged victim of sexual molestation by priest sued Milwaukee Archdiocese, which had transferred priest to California. The Superior Court, Orange County, No. 02CC06293, Ronald L. Bauer, J. denied Archdiocese's motion to quash service of summons for lack of personal jurisdiction, and Archdiocese petitioned for writ of mandate.

Holdings: The Court of Appeal, Fybel, J., held that:
(1) conduct of Archdiocese in sending priest into California met purposeful availment requirement for specific jurisdiction under "effects" test;
(2) alleged victim's claims bore substantial connection to Archdiocese's contacts with forum state; and
(3) exercise of jurisdiction over Archdiocese would comport with fair play and substantial justice.

Petition denied.

FYBEL, J.

I.
INTRODUCTION

In *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 127 Cal.Rptr.2d 329, 58 P.3d 2 (*Pavlovich*), the California

Supreme Court **158 held an out-of-state defendant may be subject to personal jurisdiction in California based upon evidence establishing the defendant engaged in intentional conduct expressly aimed at or targeting California and the defendant knew the intentional conduct would cause harm in this state. In this case, we apply this "effects" test, as expressed in *Pavlovich,* and conclude the Roman Catholic Archdiocese of Milwaukee (the Milwaukee Archdiocese) is subject to specific personal jurisdiction in California.

Plaintiff Eric Nathan Paino alleged and declared under oath that when he was a boy, Fr. Siegfried Widera (Widera), a Roman Catholic priest, molested him. Widera was working at a parish in Orange County when the alleged molestation occurred. Paino sued the Milwaukee Archdiocese, the Roman Catholic Bishop of Orange (the Orange Diocese), and Widera. Paino alleged the Milwaukee Archdiocese engaged in a cover-up of Widera's prior misconduct, which included a conviction in Wisconsin for sexual perversion against a boy, and arranged for Widera to move to California in 1973.

The evidence showed the Milwaukee Archdiocese sought to rid itself of Widera by sending him into California knowing he was a pedophile and had been convicted in Wisconsin of sexual perversion against a boy. Paino met his burden of proving, for purposes of establishing specific personal jurisdiction, the Milwaukee Archdiocese engaged in intentional conduct expressly aimed at California and knew its conduct would cause harm in this state. We therefore deny the Milwaukee Archdiocese's petition for writ of mandate challenging the order denying the Milwaukee Archdiocese's motion to quash service of summons.

Our opinion resolves only the Milwaukee Archdiocese's writ petition and reviews only jurisdictional facts. We do not address the merit of any claims or defenses.

*427 II.

ALLEGATIONS AND JURISDICTIONAL FACTS

A. Widera is Convicted of Child Molestation in Wisconsin.

Widera was ordained as a Roman Catholic priest in 1967 and was incardinated in the Milwaukee Archdiocese. [FN1] He died in 2003.

> FN1. Incardination is a formal state by which a Roman Catholic priest is made subject to the authority of a bishop. (See *Stevens v. Roman Catholic Bishop of Fresno* (1975) 49 Cal.App.3d 877, 885, 123 Cal.Rptr. 171.)

On July 2, 1973, a criminal complaint against Widera for sexual perversion was filed in Wisconsin Circuit Court. The complaint alleged: "Frank Siegfried Widera, [minor boy] and [minor boy] went from Port Washington to Random Lake on Sat. June 30 and in the course of traveling to Random Lake on or near the intersection of State Highway 57 and County Highway K in the Township of Fredonia, Ozaukee County [minor boy] placed his mouth over the pen[i]s of Frank Siegfried Widera." On August 13, 1973, Widera pleaded guilty and was sentenced to three years' probation.

At the time of arrest, Widera was a priest at St. Mary's Parish in Port Washington, Wisconsin. On July 31, 1973, the Roman Catholic Archbishop of Milwaukee, William Cousins (Cousins), determined Widera had to be transferred immediately from St. Mary's. Both Cousins and the Milwaukee Archdiocesan Personnel Board [FN2] knew about the criminal conviction **159 and knew Widera was a pedophile. An August 14, 1973 document on the Archdiocesan Personnel Board's letterhead states: "Communication from Archbishop William E. Cousins to J.

Theisen, Exec. Sec. of Priests' Personnel Board [¶] ... [¶] Father Widera was arrested for, as the Milwaukee Sentinel stated it, sexual perversion with young boys. He appeared in the Ozaukee County Court yesterday, August 13, 1973 and was sentenced to three years probation. The Judge, who imposed the sentence, also ordered that Father Widera may *not* return to the Port Washington area. [¶] Father Widera is presently seeing Dr. Leo F. Graham twice a week." Fr. John Theisen (Theisen), director of the Archdiocesan Personnel Board, testified in deposition he knew as of 1973 that Widera was a pedophile and had been criminally convicted of child molestation.

> FN2. The Archdiocesan Personnel Board's primary purpose was to make recommendations to the Archbishop for placing diocesan priests.

B. *Other Incidents of Child Molestation by Widera in Wisconsin*

The Milwaukee Archdiocese also knew the child molestation resulting in Widera's conviction was not an isolated incident. Fr. Rolland Glass (Glass) ***428** was the pastor at St. Mary's Parish, where Widera had served from 1972 through 1973. On September 3, 1973, Fr. Paul Esser had a conversation with Glass about Widera. Esser's memorandum of the interview stated: "[Widera] was a 'loner.' He had difficulty relating with adults. He had instant rapport with young boys and spent a lot of time with them. [¶] ... [¶] 7. A male grade school teacher saw Fr. Widera fooling around with the boys of another teacher. He said to father that if he fooled around in the same way with his students, he would punch Father in the face. [¶] 8. Fr. Glass had reports for some time from within and without the parish that something was wrong. [¶] 9. He coached the boys in basketball. He would be in the shower with the boys--all in

the nude. When an adult male entered the shower, Fr. [Widera] covered himself with a towel. [¶] 10. Fr. [Widera] took boys swimming at a motel in Milwaukee. Father knew the owner and could use the pool. This happened over a period of time. [¶] 11. Parishioners came forward after the fact and indicated incidents they had noticed and warnings they had given their own children about not letting Father touch them. [¶] Fr. Glass' mother told Glass that Fr. [Widera] on at least one occasion had a boy sleep with him overnight in the rectory. [¶] 13. Fr. Glass did confront Fr. [Widera]: 'Circumstances are forcing me to draw certain conclusions about you and your conduct with little boys.' Fr. [Widera] stopped seeing boys for a time but then went back to it. [¶] 14. There was a pattern of contact with small bo[ys]."

In early September of 1973, Widera was assigned to "help[ ] out" at St. Andrew's Parish in Delavan, Wisconsin. Widera was allowed to work with children. In February 1974, the vice-president of the St. Andrew's school board wrote to Theisen, "I'm writing to tell you how pleased we are to have Fr. Sig Widera here in St. Andrew's Parish. He has endeared himself to all who have had contact with him. [¶] The children in our school literally follow him around; he is so kind and shows so much interest in them." Several St. Andrew's parishioners wrote to the Archdiocesan Personnel Board praising Widera's abilities with children. Although Theisen responded to each of these letters, he did not disclose Widera's conviction or other reports of possible child molestation.

On June 29, 1976, Cousins contacted the archdiocese's ombudsman [FN3] to inform him **160 another allegation had been made against Widera. The ombudsman's notes had this entry for June 29: "Archbishop called--Mike Short, a therapist in Elkhorn, had called in to Bob Sampon--Short is a

counselor and now advocate for [redacted text]. She reported to Short that her son had been sexually molested by Fr. Widera while on a weekend fishing outing--Son is [redacted name] age 13, an altar boy at Parish. Archbishop suggested I call Widera first, then Short, assuring complainants that W. will be removed from *429 parish and will receive in-patient treatment, if necessary." The ombudsman's notes for July had this entry: "Widera admitted that he made 'a slip'. He took boy fishing alone about 3 weeks ago. He had heard nothing about the incident." The ombudsman told Widera he would "try to keep the lid on the thing, so no police record would be made," but Widera probably would be transferred and would need inpatient treatment.

> FN3. The ombudsman assisted and represented priests vis-à-vis the bishop and other church officials in addressing problems and concerns, such as allegations of sexual abuse.

The ombudsman then contacted Widera's therapist, Mike Short. Short stated he would contact the boy's mother and "convince her not to act with police, if Church removes W. from parish, and gets him help, as well as counsels the boy." On July 8, 1976, the ombudsman told Widera "anticipate moving from Delavan after [your] probation is over [¶] not to tell Fr. Henke [the pastor of St. Andrew's] at this time [¶] stay away from [redacted name] [¶] also stay away from another boy [you are] seen with frequently." Widera could not be transferred until after Labor Day because of "replacement problems."

On August 20, 1976, Fr. Henke (Henke) reported allegations made against Widera to the Archdiocesan Personnel Board. Notes from the Archdiocesan Personnel Board stated, "8/20/76--telephone--E. Henke--informed that S. Widera has

had an incident with an 11 year old boy a couple of months ago. Henke is concerned that the talk may become vicious against him in such a small town because news travels fast." It is not clear whether the allegations reported by Henke were the same as those reported to the ombudsman by Short. Henke wanted Widera removed.

C. Widera Goes "On Vacation" to California and Takes Faculties in the Orange Diocese.

On August 20, 1976, the ombudsman spoke with Henke and Widera. The ombudsman wrote in his notes: "Called Henke and Widera--they agreed that W. would go 'on vacation' (California!) as soon as Waldbauer [[FN4]] would find supply help. Then [Widera] would be transferred. W. should tell people only that he's going on vacation." Widera told the Archdiocesan Personnel Board he "plans to leave St. Andrew Parish, Delavan, on Monday, Aug. 23; he plans to go to his brother's place" in Costa Mesa, California. On August 23, the ombudsman told Cousins of these "developments." Widera soon left for California.

> FN4. Fr. John Waldbauer (Waldbauer) was the executive secretary of the Archdiocesan Personnel Board.

On August 27, 1976, the ombudsman wrote in his notes: "Approached Esser about above--the Personnel Board has heard nothing from anyone--***430** Archbishop has *not* spoken to Personnel Board about this matter [¶] ... [¶] Paul [Esser] would have a problem in conscience to re-assign Siegfried--When? and should they really--in view of Widera's record? ? ?"

****161** In October 1976, Widera contacted the Archdiocesan

Personnel Board and asked what positions would be open if he returned to Wisconsin. Widera considered asking for a leave of absence or for work in a California parish.

On October 29, 1976, Waldbauer sent Widera a letter stating: "This letter is written to you to follow our telephone conversation Wednesday morning. This relates to the recommendation of the Personnel Board at its meeting of October 26th. After I spoke with you, I called the Archbishop, who is aware of this direction and supports its intent. [¶] The Personnel Board recommends a choice. First, that you pursue significant counseling to assist you in coming in touch with yourself about the action that has brought about a hasty exit from your last two assignments.... Subsequent to such therapy, you would be considered for an appointment within the Archdiocese. The alternative would be for you to be released to the services of another diocese; with the permission of the Archbishop, you would request to minister elsewhere. Should you select the second alternative, the Board would ask periodic reports about your status."

In response, Widera wrote, "the choice of being released to the service of another diocese has its merits." Widera announced he would travel to Milwaukee in November to personally discuss the situation. Widera also wrote: "As to my present situation, I was in contact with Dr. Graham and [the ombudsman] before I left Wisconsin. It was on advice that I left the area. But think that it is time for me to return."

On December 3, 1976, Cousins informed the Archdiocesan Personnel Board that "S. Widera--will spend some time with his parents in Florida and then go to California to continue psychotherapy" and that Cousins "plans to contact Bishop Johnson of Orange to see if there might be something available for Widera." Cousins's authorization was necessary for Widera to work as a priest outside of the Milwaukee

Archdiocese. On December 17, 1976, Cousins informed the board he had "called Bishop Johnson in Orange about possibility for S. Widera."

In a letter dated December 20, 1976, Cousins wrote to Bishop William Johnson (Johnson) and the secretary/chancellor of the Diocese of Orange, Fr. Michael Driscoll (Driscoll). Cousins wrote: "A few days ago I talked by phone to Bishop Johnson about a possible pastoral assignment for Father Siegfried Widera of this Archdiocese. The conversation was very general and the Bishop suggested that perhaps something could be done on a temporary *431 basis. My reason for approaching Bishop Johnson is founded in the fact that Father Widera's brother and family live in Costa Mesa, California.... [¶] ... [¶] Father Widera was ordained in 1967 and has done good work for the Diocese in the places to which he was assigned. In his earlier years there was a moral problem having to do with a boy in school. This seemed adequately confronted through treatment and an intense desire upon Father's part to avoid any repetition of a previous offense. [¶] More recently, however, there has been a repetition, and according to our State Laws further psychiatric treatment is mandated with the strong recommendation that no immediate assignment be made in the environs of the Archdiocese. [¶] Father Widera has cooperated in every way and is presently under treatment. His doctor is somewhat in favor of his leaving the scene but expects that there will be continuing treatment. This has already been arranged and a doctor in California will take over at this point. From all the professional information I can gather there would seem no **162 great risk in allowing this man to return to pastoral work, but there are legal complications at present writing. Incidentally, these legal technicalities would permit Father's going to another State as long as treatment is continued. [¶] ... [¶] There is no thought of incardination involved, and I am quite willing to

accept the man back into the Archdiocese whenever circumstances would indicate. Though I anticipate no recurrence of this past aberration, I would certainly want to be informed if the slightest suspicion were to develop. I would like to show fraternal charity to a fellow priest but I cannot be virtuous at the expense of a fellow Bishop."

On January 10, 1977, Widera was appointed as associate pastor "in hospitality" at St. Pius V Parish in Buena Park. Driscoll wrote to Cousins confirming the appointment. In response, Cousins wrote a letter to Johnson confirming Widera would remain a member of the Milwaukee Archdiocese and stating: "Permit me to express my sincere thanks to you and those involved for this consideration of a priest who has done good work and whose absence from the Diocese is predicated upon the local situation discussed in earlier letters. [¶] I fully expect that upon the recommendation of those professionally helping him at the present time he will be reassigned in our Archdiocese." Cousins also wrote to Widera telling him: "According to our earlier conversations, your stay in California will be determined by the doctor recommended to you before your departure and to whom I confidently trust you have committed yourself for necessary help. Treatment is important to you and essential to your future assignment, but I have every reason to believe that you will accept this condition and work towards an early return."

The Milwaukee Archdiocese did not inform the Orange Diocese of Widera's criminal conviction for sexual perversion, provided no specific information regarding any of the molestation allegations, and did not warn that Widera might be a danger among children. Driscoll testified he would not *432 have recommended accepting into the Orange Diocese any priest who had a criminal conviction or who posed a danger to minors.

During the period in which Widera worked in California but was incardinated in Wisconsin, he remained subject to the jurisdiction, authority, and control of the Archbishop of Milwaukee. The Archbishop of Milwaukee had the authority to recall Widera to Wisconsin, to remove his faculties as a priest, to investigate whether he had committed acts of molestation, and to petition the Pope to laicize him.

Widera worked at St. Justin Martyr Parish in Anaheim from April 1977 to July 1981. Widera allegedly molested two boys while serving at St. Justin Martyr. There is no evidence these allegations were reported at the time to any church officials. In July 1981, Widera was transferred to St. Edward's Parish in Dana Point because diocesan policy was to rotate associate pastors every four years.

D. *Widera Is Excardinated from the Milwaukee Archdiocese and Incardinated in the Orange Diocese.*

In October of 1981, Widera sought incardination into the Orange Diocese. Under Canon Law, a diocesan priest cannot be incardinated in two dioceses at the same time. (See *Stevens v. Roman Catholic Bishop of Fresno, supra,* 49 Cal.App.3d 877 at p. 885, 123 Cal.Rptr. 171.) The proper canonical process was to excardinate Widera from the Milwaukee Archdiocese and to incardinate him into the Orange Diocese. Once a diocesan priest becomes incardinated in a new diocese, his ****163** relationships, obligations, and connections with the former diocese cease.

Widera was excardinated from the Milwaukee Archdiocese and incardinated in the Orange Diocese on November 23, 1981. Widera accordingly was removed from the Milwaukee Archdiocesan priest fund, personnel roll, pension plan, priest senate, and payroll.

Correspondence between the Milwaukee Archdiocese and the Orange Diocese was exchanged during the process of Widera's excardination and incardination. In a letter dated October 27, 1981, Driscoll formally requested the Archbishop of Milwaukee to excardinate Widera. Driscoll wrote, "Father Widera came to the Diocese *for medical reasons* and [Cousins] wrote [Johnson], regarding the possibility of extending the Hospitality of the Diocese of Orange to Father Widera while he was *on leave* from the Archdiocese of Milwaukee." (Italics added.) In a letter dated November 23, 1981, enclosing the letter of excardination, Msgr. Sylvester Gass, the Milwaukee Archdiocese's Vicar General, wrote to Driscoll: "Canon 117, 2° ***433** mentions that testimonials regarding the priest's birth, life, moral character and studies are to be provided by the excardinating bishop. If you have need of any or all of this pertinent information, we shall be happy to provide it." In a letter to Gass dated December 4, 1981, Driscoll thanked the Archbishop of Milwaukee for granting Widera's request for excardination and stated, "[r]egarding the materials on file in your Chancery Office concerning testimonials of Father Widera, we believe that these testimonials can remain on file in the archives of the Archdiocese of Milwaukee and it is not necessary to forward them to us." None of the correspondence from the Milwaukee Archdiocese mentioned Widera's criminal conviction.

Widera's decree of incardination in the Orange Diocese stated the diocese was "officially advised that you [Widera] have [received] a decree of excardination from THE ARCHDIOCESE OF MILWAUKEE *with assurance of your good character, your course of studies and your good example.*" (Italics added.)

After incardination in the Orange Diocese, Widera worked at several parishes until he was assigned to St. Martin de Porres in Yorba Linda in July 1985. Paino attended St. Martin de Porres. Paino declared under oath: "When Father Widera was transferred to St. Martin de Porres, he immediately began to befriend me and my family. [¶] ... In 1985, shortly after he came to St. Martin de Porres, and when I was 8 years old, Father Widera began to molest me."

III.
PROCEEDINGS IN THE TRIAL COURT

In April 2002, Paino filed a complaint against the Orange Diocese, the Milwaukee Archdiocese, and Widera, alleging 11 causes of action based upon alleged acts of sexual abuse. Paino alleged that "[e]ven though the Defendants Dioceses knew and should have known that Father Widera had molested and sexually abused minors, and even though the Defendant Dioceses had actual and constructive knowledge of the molestations and sexual abuses, the Defendants Dioceses[ ] covered up the molestations and abuses by Father Widera, continued to allow Father Widera to act as a Catholic priest within the Defendants Dioceses[ ], continued to hold Father Widera out as a Catholic priest who could be trusted with minor parishioners and minor students, continued to allow Father Widera to work with minor parishioners and minor students on a daily basis, and continued to move Father Widera around to **164 different Catholic churches within the Defendants Dioceses[ ]."

The Milwaukee Archdiocese moved to quash service of summons for lack of personal jurisdiction. Paino opposed the motion.

*434 At the hearing on October 21, 2002, the court denied the motion to quash, stating: "I'm going to deny the motion.

I believe that the critical issue of whether this moving party deliberately and purposefully availed itself of the jurisdiction of the State of California is one that requires that I deny the motion. [¶] The evidence is certainly sufficient to show that the Archdiocese in Milwaukee chose to place this troublesome member of its clergy here in California as a sort of lend-lease program with the hope that he would be out of their sight and out of their jurisdiction. [¶] But the danger may or may not have been adequately explained. Even if the danger was fully explained, I think the issue there doesn't alter the court's conclusion about the Archdiocese of Milwaukee's deliberate and intentional availing of the facilities here in California. [¶] That may well pass the responsibility on to the Diocese of Orange, but it doesn't mean that the Archdiocese of Milwaukee did not intentionally avail itself of the facilities here in California. [¶] So I have to deny the motion."

The Milwaukee Archdiocese filed a petition for writ of mandate challenging the order denying its motion to quash. We issued an order to show cause, asked for a response to the petition, and heard oral argument.

IV.
BURDEN OF PROOF AND STANDARD OF REVIEW

[1][2][3] "When a nonresident defendant challenges personal jurisdiction, the plaintiff bears the burden of proof by a preponderance of the evidence to demonstrate the defendant has sufficient minimum contacts with the forum state to justify jurisdiction." (*DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1090, 128 Cal.Rptr.2d 683; see also *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449, 58 Cal.Rptr.2d 899, 926 P.2d 1085 (*Vons*).) The plaintiff must " 'present facts demonstrating that the conduct of defendants related to the pleaded causes

is such as to constitute constitutionally cognizable "minimum contacts." [Citation.]' " (*DVI, Inc. v. Superior Court, supra,* 104 Cal.App.4th at pp. 1090-1091, 128 Cal.Rptr.2d 683.) "An unverified complaint has no evidentiary value in meeting the plaintiff's burden of proving minimum contacts." (*Id.* at p. 1091, 128 Cal.Rptr.2d 683.)

[4][5][6][7] When the evidence of jurisdictional facts is not in dispute, whether the defendant is subject to personal jurisdiction is a legal question subject to de novo review. (*Vons, supra,* 14 Cal.4th at p. 449, 58 Cal.Rptr.2d 899, 926 P.2d 1085.) When evidence of jurisdiction is in dispute, the trial court's determination of factual issues is reviewed for substantial evidence. (*Ibid.;* see also *DVI, Inc. v. Superior Court, supra,* 104 Cal.App.4th at p. 1091, 128 Cal.Rptr.2d 683.) We must accept the trial court's resolution of factual issues and draw all reasonable inferences in support of ***435** the trial court's order. (*Integral Development Corp. v. Weissenbach* (2002) 99 Cal.App.4th 576, 584, 122 Cal.Rptr.2d 24.) "The ultimate question whether jurisdiction is fair and reasonable under all of the circumstances, based on the facts which are undisputed and those resolved by the court in favor of the prevailing party, is a legal determination warranting our independent review." (*Id.* at p. 585, 122 Cal.Rptr.2d 24.)

****165** V.
JURISDICTIONAL REQUIREMENTS

[8] California courts may exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of this state or of the United States." (Code Civ. Proc., § 410.10.) The statute "manifests an intent to exercise the broadest possible jurisdiction, limited only by constitutional considerations." (*Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445, 128 Cal.Rptr. 34, 546 P.2d 322.)

[9][10] The federal Constitution permits a state to exercise jurisdiction over a nonresident defendant if the defendant has sufficient "minimum contacts" with the forum such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' [Citations.]" (*Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95.) "The 'substantial connection,' [citations], between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.* [Citations.]" (*Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92.)

[11][12][13] "Personal jurisdiction may be either general or specific." (*Vons, supra,* 14 Cal.4th at p. 445, 58 Cal.Rptr.2d 899, 926 P.2d 1085.) A nonresident defendant is subject to the forum's general jurisdiction where the defendant's contacts are " 'substantial ... continuous and systematic.' " (*Ibid.,* quoting *Perkins v. Benguet Consol. Mining Co.* (1952) 342 U.S. 437, 445, 446, 72 S.Ct. 413, 96 L.Ed. 485.) In that situation, the cause of action need not be related to the defendant's contacts. (*Vons, supra,* 14 Cal.4th at p. 445, 58 Cal.Rptr.2d 899, 926 P.2d 1085; *Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147, 127 Cal.Rptr. 352, 545 P.2d 264.) "Such a defendant's contacts with the forum are so wide-ranging that they take the place of physical presence in the forum as a basis for jurisdiction." (*Vons, supra,* 14 Cal.4th at p. 446, 58 Cal.Rptr.2d 899, 926 P.2d 1085.)

[14] If the nonresident defendant does not have substantial and systematic contacts with the forum state, the defendant may be subject to specific jurisdiction if (1) " 'the defendant has purposefully availed himself or herself of forum benefits' " with respect to the matter in controversy, (2) " 'the ***436**

"controversy is related to or 'arises out of' [the] defendant's contacts with the forum," ' " and (3) the exercise of jurisdiction would comport with fair play and substantial justice. (*Pavlovich, supra,* 29 Cal.4th at p. 269, 127 Cal.Rptr.2d 329, 58 P.3d 2; *Vons, supra,* 14 Cal.4th at pp. 446, 447, 58 Cal.Rptr.2d 899, 926 P.2d 1085; see also *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528.)

VI.
DISCUSSION

Paino does not assert the Milwaukee Archdiocese is subject to general jurisdiction in California. He contends the trial court was correct in concluding the Milwaukee Archdiocese was subject to specific jurisdiction because the Milwaukee Archdiocese purposefully availed itself of forum benefits by taking actions to move Widera, a known pedophile, into California, where he continued to molest boys.

A. *Purposeful Availment*

[15][16][17] The purposeful availment inquiry focuses on the defendant's " 'intentionality' " and is satisfied " 'when the defendant purposefully and voluntarily directs his activities toward the forum so that he should expect, by virtue of the **166 benefit he receives, to be subject to the court's jurisdiction based on' his contacts with the forum." (*Pavlovich, supra,* 29 Cal.4th at p. 269, 127 Cal.Rptr.2d 329, 58 P.3d 2.) The purposeful availment requirement is intended to ensure a defendant will not be haled into a jurisdiction solely as a result of " 'random,' 'fortuitous,' or 'attenuated' " contacts, or as a result of the " 'unilateral activity' " of another party or a third person. (*Ibid.*) Purposeful availment asks whether the defendant's "conduct and connection with the forum State are such that he should reasonably anticipate

being haled into court there." (*World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490.)

1. *Express Aiming or Targeting*

[18] Under the "effects" test for determining purposeful availment, a defendant might be subject to jurisdiction in the forum state if the defendant engaged in intentional conduct "*expressly aimed at or targeting* the forum state," and the defendant knew the intentional conduct would cause harm in the forum. (*Pavlovich, supra,* 29 Cal.4th at p. 271, 127 Cal.Rptr.2d 329, 58 P.3d 2.)

In *Pavlovich, supra,* 29 Cal.4th at page 262, 127 Cal.Rptr.2d 329, 58 P.3d 2, the Supreme Court considered whether a California court properly exercised personal jurisdiction over a defendant based upon the posting of an Internet Web site. Pavlovich was a ***437** Texas resident and had no contacts with California. (*Id.* at p. 266, 127 Cal.Rptr.2d 329, 58 P.3d 2.) He founded and was leader of a video project which operated a Web site that posted the source code of a program named DeCSS. (*Id.* at pp. 266-267, 127 Cal.Rptr.2d 329, 58 P.3d 2.) DeCSS allowed a user to circumvent the Content Scrambling System (CSS), which prevents the playing or copying of copyrighted motion pictures recorded on digital versatile discs (DVD's). (*Ibid.*) In short, DeCSS allowed a user to download copyrighted movies onto the user's hard drive or other storage media. (*Ibid.*)

DVD Copy Control Association, Inc. (DVD CAA), is a nonprofit trade organization organized under Delaware law with its principal place of business in California. (*Pavlovich, supra,* 29 Cal.4th at p. 266, 127 Cal.Rptr.2d 329, 58 P.3d 2.) DVD CAA's purpose was to control and administer licensing of CSS technology. (*Ibid.*) DVD CAA sued Pavlovich in

California, alleging he misappropriated its trade secrets by posting the DeCSS program on his Web site. (*Id.* at p. 267, 127 Cal.Rptr.2d 329, 58 P.3d 2.) The evidence showed Pavlovich knew of an organization which controlled the use of CSS technology, but did not learn that organization was DVD CAA or that DVD CAA had its principal place of business in California until after the lawsuit was filed. (*Ibid.*) DVD CAA asserted personal jurisdiction on the ground Pavlovich knew his actions would harm California businesses.

The California Supreme Court examined and clarified the effects test for determining purposeful availment. (*Pavlovich, supra,* 29 Cal.4th 262, 127 Cal.Rptr.2d 329, 58 P.3d 2.) The court turned first to *Calder v. Jones* (1984) 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (*Calder*) in which the United States Supreme Court described the " 'effects test' " in the defamation context. (*Pavlovich, supra,* 29 Cal.4th at p. 269, 127 Cal.Rptr.2d 329, 58 P.3d 2.) In *Calder,* a reporter in Florida wrote an article for the National Enquirer about Shirley Jones, a well-known actress who lived and worked in California. Jones sued the reporter and the editor for libel in California. They moved to quash service of process on the ground they ****167** lacked minimum contacts with California. (*Calder, supra,* 465 U.S. at pp. 785-786, 104 S.Ct. 1482.) The United States Supreme Court disagreed, and upheld jurisdiction because "[t]he allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California.... [T]he brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in

California." (*Id.* at pp. 788-789, 104 S.Ct. 1482, fn. omitted.) The defendants' intentional conduct was "expressly aimed at California," where the defendants knew it potentially would harm Jones. (*Id.* at p. 789, 104 S.Ct. 1482.)

The *Pavlovich* court recognized the lack of uniformity in applying the *Calder* test. (*Pavlovich, supra,* 29 Cal.4th at p. 270, 127 Cal.Rptr.2d 329, 58 P.3d 2.) In particular, the ***438** *Pavlovich* court acknowledged that courts have struggled over whether *Calder* stands for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. (*Ibid.*) The *Pavlovich* court reviewed federal and out-of-state cases and concluded, "virtually every jurisdiction has held that the *Calder* effects test requires intentional conduct *expressly aimed at or targeting* the forum state in addition to the defendant's knowledge that his intentional conduct would cause harm in the forum." (*Id.* at p. 271, 127 Cal.Rptr.2d 329, 58 P.3d 2, fn. omitted.) The *Pavlovich* court "join[ed] with those jurisdictions that require additional evidence of express aiming or intentional targeting." (*Id.* at p. 273, 127 Cal.Rptr.2d 329, 58 P.3d 2.)

Applying the effects test, the *Pavlovich* court concluded Pavlovich was not subject to California jurisdiction because there was no evidence the Web site targeted California or any California resident visited the Web site. (*Pavlovich, supra,* 29 Cal.4th at p. 274, 127 Cal.Rptr.2d 329, 58 P.3d 2.) The court concluded Pavlovich's knowledge that his tortious conduct might harm certain industries *centered* in California, though relevant to any determination of personal jurisdiction, "*alone* is insufficient to establish express aiming at the forum state as required by the effects test." (*Id.* at p. 278, 127 Cal.Rptr.2d 329, 58 P.3d 2.)

2. *Application of Effects Test*

[19] Did the Milwaukee Archdiocese engage in intentional conduct expressly aimed at or targeting California, knowing the intentional conduct would cause harm in this state? The evidence supports the conclusion the Milwaukee Archdiocese intentionally sent Widera to California to get him out of Wisconsin where he had been convicted of sexual perversion against a boy and could create further problems for the Milwaukee Archdiocese. As the trial court concluded, "the evidence is certainly sufficient to show that the Archdiocese of Milwaukee chose to place this troublesome member of its clergy here in California as a sort of lend-lea. program with the hope that he would be out of their sight and out of their jurisdiction." The evidence supported the conclusion the Milwaukee Archdiocese knew Widera was a pedophile and posed a serious threat of sexually abusing boys in California. By sending a known pedophile into California, the Milwaukee Archdiocese aimed its intentional conduct directly at this state. The brunt of the harm, indeed all of the harm, resulted in California. Having sent Widera into California knowing he was a convicted child abuser and a pedophile, the Milwaukee ****168** Archdiocese reasonably could expect to be haled into court in California to answer for the consequences of its actions.

The Milwaukee Archdiocese contends the evidence does not support a finding of purposeful availment. The Milwaukee Archdiocese contends Widera voluntarily moved to California in 1976 because he had family here. ***439** The evidence supports a contrary conclusion. As part of his sentence for sexual perversion, Widera was ordered not to return to the Port Washington, Wisconsin area. Henke, the pastor of St. Andrew's Parish, wanted Widera removed. Concerns were raised over whether Widera could "in conscience" be reassigned within the Milwaukee Archdiocese "in view of Widera's record." A cover story

was created: Widera would go " 'on vacation' " to California. In the ombudsman's notes, the words "on vacation" were set off by quotation marks. When asked why he was leaving, Widera was instructed to say "only that he's going on vacation." After going to California, Widera wrote: "It was on advice that I left the area."

Once Widera was in California, the Milwaukee Archdiocese never recalled him, although it had the power to do so, never questioned him, never monitored his treatment, and never conducted an investigation to determine whether he continued to molest boys. The Milwaukee Archdiocese allowed Widera to be excardinated so he could be incardinated in the Orange Diocese. Accepting the trial court's resolution of factual issues and drawing all reasonable inferences in support of the trial court's order (*Integral Development Corp. v. Weissenbach, supra,* 99 Cal.App.4th at p. 584, 122 Cal.Rptr.2d 24), we conclude the evidence supports the finding that the Milwaukee Archdiocese made and enacted a concerted plan to rid itself of Widera by intentionally placing him in California.

The Milwaukee Archdiocese contends it sufficiently disclosed Widera's prior misconduct to the Orange Diocese. The Milwaukee Archdiocese points to Cousins's letter of December 20, 1976, in which Cousins wrote that Widera "[i]n his earlier years" had "a moral problem having to do with a boy in school" and that "[m]ore recently ... there has been a repetition."

Is it relevant to the "effects" test whether or not the Milwaukee Archdiocese disclosed Widera's prior misconduct to the Orange Diocese? No. The Milwaukee Archdiocese rid itself of Widera by sending him into California, knowing he was a pedophile and had been convicted of perversion with a boy. The Milwaukee Archdiocese's conduct was intentional

and was expressly aimed at California. The Milwaukee Archdiocese knew its intentional conduct would cause harm in California. Thus, the Milwaukee Archdiocese's conduct satisfied the "effects" test, regardless whether it gave the Orange Diocese "fair warning" of Widera's prior misconduct.

Even if considered, Cousins's letter, with all reasonable inferences favoring the trial court's order (*Integral Development Corp. v. Weissenbach, supra,* 99 Cal.App.4th at p. 584, 122 Cal.Rptr.2d 24), supports the conclusion the Milwaukee Archdiocese engaged in express aiming at or targeting California. The letter appears to be intentionally vague and incomplete; it does not describe what is meant by "a ***440** moral problem," does not disclose when the "moral problem" occurred, does not identify the repetition, and, most importantly, does not disclose Widera's criminal conviction for sexual perversion. The letter states, "there would seem no great risk in allowing [Widera] to return to pastoral work" when, in fact, there was great risk in allowing Widera to be near boys. In fact, the record contains no evidence the Milwaukee Archdiocese ever informed the Orange Diocese ****169** of Widera's criminal conviction or specifically described his misconduct.

Another issue remains in applying the effects test. In *Pavlovich, supra,* 29 Cal.4th 262, 127 Cal.Rptr.2d 329, 58 P.3d 2, the court concluded Pavlovich's knowledge that his tortious conduct might harm certain industries *centered* in California was not dispositive of jurisdiction. "Because the only evidence in the record even suggesting express aiming is Pavlovich's knowledge that his conduct may harm industries centered in California, due process requires us to decline jurisdiction over his person." (*Id.* at p. 278, 127 Cal.Rptr.2d 329, 58 P.3d 2.) Some federal courts, in formulating the effects test, have concluded " 'express aiming' encompasses wrongful conduct individually targeting

a known forum resident." (*Bancroft & Masters, Inc. v. Augusta Nat. Inc.* (9th Cir.2000) 223 F.3d 1082, 1087; see also, e.g., *Cybersell, Inc. v. Cybersell, Inc.* (9th Cir.1997) 130 F.3d 414, 416.)

Here, the Milwaukee Archdiocese did not know who Paino was and could not have expressly aimed its conduct at him. However, we do not believe the effects test required the Milwaukee Archdiocese to know the identities of Widera's future victims. This is not a situation, as in *Pavlovich,* where the defendant's conduct *could* harm any of a number of industries and businesses, some of which *might* be centered in California. The nature of the Milwaukee Archdiocese's conduct--sending a pedophile priest directly into California--meant the Milwaukee Archdiocese's conduct *would* harm California residents. In other words, the Milwaukee Archdiocese's conduct targeted a known group of California residents--boys, specifically, Roman Catholic boys-- as a means of getting Widera out of the Milwaukee Archdiocese. Such targeting is, we believe, sufficiently individualized to satisfy due process because the Milwaukee Archdiocese could reasonably anticipate being haled into court in California.

The Milwaukee Archdiocese argues the case of *Doe v. Roman Catholic Diocese of Boise, Inc.* (N.M.Ct.App.1996) 121 N.M. 738, 918 P.2d 17 is "strikingly similar" and supports quashing service of summons. We disagree. In that case, the Roman Catholic Bishop of Boise granted a priest's request to leave Idaho and seek assignment as a priest elsewhere. (*Id.* at p. 740, 918 P.2d 17.) The priest went to New Mexico, where he was accused of molesting a boy. (*Ibid.*) The New Mexico Court of Appeals held the Roman Catholic Diocese of Boise was not subject to jurisdiction in New Mexico ***441** because the diocese played no part in the priest's decision to settle in New Mexico, but only granted

the priest permission to leave Idaho. "The fact that after the Boise Diocese gave Father Garcia permission to leave Idaho, Father Garcia subsequently selected New Mexico from among several other possible diocesan destinations in which to seek employment as a priest does not constitute a purposeful act by the Boise Diocese to avail itself of the benefits and protections of New Mexico law." (*Id.* at p. 744, 918 P.2d 17.)

Here, in stark contrast, the Milwaukee Archdiocese did not merely approve a request to work outside the Milwaukee Archdiocese or acquiesce in Widera's move. Rather, the evidence supports the finding the Milwaukee Archdiocese sought to rid itself of Widera by intentionally sending him into California.

We conclude Paino met his burden of proving by a preponderance of the evidence that under the effects test, the Milwaukee Archdiocese's conduct met the purposeful availment requirement for specific jurisdiction in California. In reaching this conclusion, we do not, and need not, ****170** consider Canon Law; accordingly, we deny Paino's request for judicial notice.

B. *Relationship Between the Milwaukee Archdiocese's Contacts and the Forum*

[20][21] We next determine whether Paino's claims are related to or arise out of the Milwaukee Archdiocese's forum contacts. (*Pavlovich, supra,* 29 Cal.4th at p. 269, 127 Cal.Rptr.2d 329, 58 P.3d 2.) "A claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Rather, as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate." (*Vons,*

supra, 14 Cal.4th 434, 452, 58 Cal.Rptr.2d 899, 926 P.2d 1085; see also *Cornelison v. Chaney, supra,* 16 Cal.3d 143, 148, 127 Cal.Rptr. 352, 545 P.2d 264 ["The crucial inquiry concerns ... whether the cause of action arises out of or has a substantial connection with [the forum] activity"].)

Paino alleged, "[i]n or about 1985, when Plaintiff was about 8 years old, and continuing through when Plaintiff was 9 years old, Father Widera molested Plaintiff and Plaintiff's brother." Paino alleged the Milwaukee Archdiocese knew Widera had sexually abused boys but "covered up the molestations and abuses," continued to allow Widera to act as a Catholic priest, held out Widera as a priest who could be trusted with minors, and continued to allow Widera to work with minors.

Paino's claims bear a substantial connection to the Milwaukee Archdiocese's forum contacts. As explained above, the evidence supports the ***442** conclusion the Milwaukee Archdiocese purposefully availed itself of forum benefits by engaging in intentional conduct expressly aimed at California. That conduct consisted of ridding itself of Widera by sending him to California. Paino alleged Widera--the man whom the Milwaukee Archdiocese sent to California--molested him. Paino's claims for sexual abuse arise out of the same kind of conduct that prompted the Milwaukee Archdiocese to send Widera to California.

The Milwaukee Archdiocese argues it had no connection with California at the time Paino was allegedly molested. As the Milwaukee Archdiocese argues, the Orange Diocese was responsible for Widera's assignments after 1977, Widera was incardinated in the Orange Diocese in 1981, and Paino was not allegedly molested until four years later. In essence, the Milwaukee Archdiocese is asserting its conduct could not have caused Paino's injuries because, at least by 1981, the

Orange Diocese had assumed responsibility for Widera. In *Vons, supra,* 14 Cal.4th at pages 460-467, 58 Cal.Rptr.2d 899, 926 P.2d 1085, the California Supreme Court firmly rejected a proximate cause test for analyzing the relation between the defendant's forum contacts and the plaintiff's claims in determining specific jurisdiction. "To require that the injury be proximately caused by the forum contact is to require that the injury 'arise out of' the forum contact in the strictest sense. Such a requirement is inconsistent with the formulation that appears in [United States Supreme Court authority].... [Citations.] ... [and] is inconsistent with the relevant standard in *Cornelison* [*v. Chaney*]...." (*Id.* at p. 462, 58 Cal.Rptr.2d 899, 926 P.2d 1085.)

[22] Thus, for jurisdiction purposes, the question is not whether the Milwaukee Archdiocese's forum contacts were the proximate cause of Paino's injuries, but whether Paino's claims "bear[ ] a substantial connection" to those contacts. (*Vons,* supra, 14 Cal.4th at p. 452, 58 Cal.Rptr.2d 899, 926 P.2d 1085.) We conclude Paino's ****171** claims are substantially connected to the Milwaukee Archdiocese's intentional conduct expressly aimed at California.

C. *Fair Play and Substantial Justice*

[23][24][25] Having determined the Milwaukee Archdiocese established minimum contacts with California and those contacts are substantially related to Paino's claims, we must consider whether the assertion of specific jurisdiction is fair. In assessing fairness, we consider (1) the burden on the Milwaukee Archdiocese of defending in California, (2) California's interests, (3) Paino's interest in obtaining relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy, and (5) " 'the shared interest of several States in furthering fundamental substantive social policies.' " (*Asahi Metal*

Industry Co. v. Superior Court, supra, 480 U.S. at p. 113, 107 S.Ct. 1026; see also *Vons, supra,* 14 Cal.4th at p. 476, 58 Cal.Rptr.2d 899, 926 P.2d 1085.) The defendant bears the *443 burden of presenting a "compelling case" that jurisdiction would be unreasonable. (*Burger King Corp. v. Rudzewicz, supra,* 471 U.S. 462, 477, 105 S.Ct. 2174, 85 L.Ed.2d 528; *Integral Development Corp. v. Weissenbach, supra,* 99 Cal.App.4th at p. 591, 122 Cal.Rptr.2d 24.)

Although the Milwaukee Archdiocese is a not-for-profit organization, it is sufficiently large that defending itself in California would not impose an unreasonable burden on it. California has a particularly strong interest in asserting jurisdiction over the Milwaukee Archdiocese. California has an interest in protecting its children from sexual abuse and providing them a forum to assert such claims. California also has an interest in not becoming the target for pedophiles from other jurisdictions. Paino, a California resident, certainly has an interest in obtaining relief in California for alleged sexual molestation occurring in California. Asserting jurisdiction over the Milwaukee Archdiocese in California would provide the most efficient resolution of the controversy because Paino's claims against the Orange Diocese are pending here. Finally, Wisconsin and California have a shared interest in furthering the social policy of protecting children from sexual abuse; that social policy is furthered by asserting jurisdiction over the Milwaukee Archdiocese in California.

We therefore conclude assertion of jurisdiction over the Milwaukee Archdiocese is fair.

DISPOSITION

The Milwaukee Archdiocese's petition for writ of mandate is denied. Paino shall recover his costs incurred in this proceeding.

WE CONCUR: SILLS, P.J., and RYLAARSDAM, J.

5 Cal.Rptr.3d 154, 112 Cal.App.4th 423, 3 Cal. Daily Op. Serv. 8847, 2003 Daily Journal D.A.R. 11,117

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Court of Appeal, Fourth Appellate District,
Division Three - No. G031386
S120214

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE ARCHDIOCESE OF MILWAUKEE, Petitioner,

v.

SUPERIOR COURT OF ORANGE COUNTY, Respondent;

ERIC NATHAN PAINO, Real Party in Interest.

Application to appear pro hac vice DENIED.
Petition for review DENIED.

/s/_____
Chief Justice

(2)

Supreme Court, U.S.
FILED
MAY 19 2004
OFFICE OF THE CLERK

No. 03-1444

IN THE

Supreme Court of the United States

ARCHDIOCESE OF MILWAUKEE,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY
Respondent,
and

ERIC NATHAN PAINO,
Real Party-in-Interest

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 03-1444

IN THE

Supreme Court of the United States

ARCHDIOCESE OF MILWAUKEE,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY
Respondent,
and

ERIC NATHAN PAINO,
Real Party-in-Interest

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 2

1. Introduction 2

2. Factual Background 3

A. Father Widera Is Convicted Of Child Molestations In Wisconsin 4

B. Other Incidents Of Child Molestations By Widera in Wisconsin 5

C. Widera Goes "On Vacation To California And Takes Faculties In Orange 8

D. Widera Is Excardinated From The Milwaukee Archdiocese And Incardinated In The Orange Diocese 13

3. Proceedings Below 13

REASONS WHY THE PETITION SHOULD BE DENIED 15

1. The Court of Appeal Did Not Make The Factual Findings Set Forth In Milwaukee's "Questions Presented" 15

2. The Petitioner's Real Quibble Is That The Court of Appeal Erred In Interpreting The Facts Of This Case 17

3. Neither The Decision Nor The Record Below Raises The First Question Presented 20

4. The Decision By The California Court of Appeal Is Consistent With The Decisions Of This and Other Courts. 24

CONCLUSION 29

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson
520 U.S. 83 (1997) 21

Archdiocese of Milwaukee v.
Superior Court of Orange County
112 Cal. App. 4th 423 (2003) . . . . . passim

Board of Dirs. of Rotary Int'l v.
Rotary Club of Duarte
481 U.S. 537 (1987) 21

Calder v. Jones
465 U.S. 783 (1984) 24, 25, 27

Doe v. Roman Catholic Diocese
of Boise, Inc.
121 N.M. 738
(Ct. App. New Mexico 1996) 28

Doe 1-22 v. Roman Catholic
Bishop of Fall River
509 N.W. 2d 598 (Minn. 1993) 27

General Council v. Superior Court of California
439 U.S. 1355,
99 S. Ct. 35 (1978) 22, 23, 24

Hernandez v. New York
500 U.S. 352 (1991) 19

John Does 1-9 v. CompCare, Inc.
52 Wash. App. 688,
763 P. 2d 1237 (1988) 27

Locke v. Warner Bros., Inc.
57 Cal. App.4th 354,
66 Cal. Rptr.2d 921 (1997) 22

Miller v. Fenton
474 U.S. 104 (1985) 19

Nemarnik v. Los Angeles Kings Hockey Club
103 Cal. App.4th 631,
127 Cal. Rptr.2d 10 (2002) 21

Pavlovich v. Superior Court
29 Cal. 4th 262,
127 Cal. Rtpr. 2d 329 (2002) 25, 26

Serbian Orthodox Diocese v. Milivojevich
426 U.S. 696 (1976) 14

Tiernan v. Trustees of Cal. State University & Colleges
33 Cal.3d 211,
188 Cal. Rptr. 115 (1982) 21

RULES

United States Supreme Court Rules
Rule 10) 19

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and

ERIC NATHAN PAINO,

Real Party-In-Interest

On Petition For Writ Of Certiorari
To The Court Of Appeal, State of California
Fourth Appellate District, Division Three

REAL PARTY-IN-INTEREST'S BRIEF IN OPPOSITION

Real Party-in-Interest Eric Nathan Paino respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner Archdiocese of Milwaukee,

seeking review of the California Court of Appeal's decision in this case. That opinion is reported at *Archdiocese of Milwaukee v. Superior Court of Orange County*, 112 Cal. App. 4th 423 (2003).

STATEMENT OF THE CASE

1. Introduction.

In 1976, the Roman Catholic Archdiocese of Milwaukee (the Milwaukee Archdiocese) purposefully transferred to California Father Siegfried Widera, a priest who had been criminally convicted of child molestations three years earlier. The reason why the Milwaukee Archdiocese wanted to move Father Widera into California was because it learned that the priest had molested again, and because of "legal technicalities," he needed to get out of the State of Wisconsin. The Archbishop of Milwaukee solicited and received the help of the Diocese of Orange (Orange Diocese) to get Father Widera out of Wisconsin, and into a new position as a California priest.

The intentional and completely reckless acts by these two dioceses had a devastating impact in California. Father Widera went on to molest numerous other Catholic boys in California, including Real Party-in-Interest Eric Nathan Paino.

Paino sued the Milwaukee Archdiocese in California for its complicity in intentionally transferring this known pedophile into California. The Milwaukee Archdiocese moved to quash the summons, arguing that the California courts could not exercise personal jurisdiction over it, and

therefore, the California courts could not hold the Milwaukee Archdiocese accountable for its actions.

Both the trial court and the Court of Appeal disagreed with the Milwaukee Archdiocese. In a published decision, the Court of Appeal held:

> The evidence showed the Milwaukee Archdiocese sought to rid itself of Widera by sending him into California knowing he was a pedophile and had been convicted in Wisconsin of sexual perversion against a boy. Paino met his burden of proving, for purposes of establishing specific personal jurisdiction, the Milwaukee Archdiocese engaged in intentional conduct expressly aimed at California and knew its conduct would cause harm in this state. We therefore deny the Milwaukee Archdiocese's petition for writ of mandate challenging the order denying the Milwaukee Archdiocese's motion to quash service of summons.

Archdiocese of Milwaukee v. Superior Court of Orange County, 112 Cal. App. 4th 423, 426 (2003). The California Supreme Court denied the Archdiocese's petition for review. The Milwaukee then filed this Petition for Writ of Certiorari.

2. Factual Background.

Throughout its Petition for Writ of Certiorari, the Milwaukee Archdiocese continues to try to dispute the Court of Appeal's factual conclusions as to what really happened

when Father Widera was transferred into California. The Milwaukee Archdiocese tries to argue that Father Widera just decided go to California on his own to visit his family, that the Archdiocese just innocently acquiesced to his traveling to California, and that the only thing the Archdiocese did was fail to prevent Father Widera from working in California. As seen by the Court of Appeal's decision, nothing is further from the truth. Here are the factual conclusions made by the Court of Appeal in deciding the personal jurisdiction issue.

A. Father Widera Is Convicted of Child Molestations in Wisconsin.

Father Widera was ordained and incardinated into the Milwaukee Archdiocese in 1967. *Archdiocese of Milwaukee,* 112 Cal. App. 4th at 427. On July 2, 1973, a criminal complaint for sexual perversion was filed against Widera. The complaint alleged:

> Frank Siegfried Widera, _____ and _____ [minor boys' names omitted in original] went from Port Washington to Random Lake . . . and in the course of traveling to Random Lake . . . _____ [minor boy's name omitted in original] placed his mouth over the penis of Frank Siegfried Widera.

Id. At the time of his arrest, Widera had been serving as a priest at St. Mary's in Port Washington, Wisconsin. *Id.* Less than one month after Widera's arrest, on July 31, 1973, the Archbishop of the Milwaukee Archdiocese, William E. Cousins, ordered the immediate transfer of Widera from St.

Mary's. *Id.* Two weeks later, on August 13, 1973, Widera pled guilty and was sentenced to three years' probation. *Id.* The following day, on August 14, 1973, a document from the Archdiocesan Personnel Board (the board which assisted the Archbishop and offered recommendations regarding priest placement) stated:

> Communication from Archbishop Cousins to J. Theisen, Exec. Sec. of Priests' Personnel Board . . . Father Widera was arrested for, as the Milwaukee Sentinel stated it, sexual perversion with young boys. He appeared in the Ozaukee County Court yesterday, August 13, 1973 and was sentenced to 3 years probation. The Judge, who imposed the sentence, also ordered that Father Widera may not return to the Port Washington area. Father Widera is presently seeing Dr. Leo Graham twice per week.

Id. at 427.

B. Other Incidents of Child Molestations by Widera In Wisconsin.

The Milwaukee Archdiocese knew that the child molestation resulting in Widera's conviction was not an isolated incident. *Id.* In early September 1973, Father Rolland Glass, the pastor at St. Mary's, discussed Father Widera with Father Paul Esser. Esser's memorandum of the interview stated:

> [Widera] was a 'loner.' He had difficulty relating with adults. He had instant rapport with young boys and spent a lot of time with them. . . [¶] A male grade school teacher saw Fr. Widera fooling around with the boys of another teacher. He said to Father that if he fooled around in the same way with his students, he would punch Father in the face. [¶] Fr. Glass had reports for some time from within and without the parish that something was wrong. [¶] He coached the boys in basketball. He would be in the shower with the boys – all in the nude. When an adult male entered the shower, Fr. [Widera] covered himself with a towel . . . [¶] Parishioners came forward after the fact and indicated incidents they had noticed and warnings they had given their own children about not letting Father touch them. [¶] Fr. Glass' mother told Glass that Fr. [Widera] on at least one occasion had a boy sleep with him overnight in the rectory. [¶] Fr. Glass did confront Fr. [Widera]: 'Circumstances are forcing me to draw certain conclusions about you and your conduct with little boys.' [¶] Fr. [Widera] stopped seeing boys for a time but then went back to it. There was a pattern of contact with small bo[ys].

Id. at 427-28.

In September 1973, while on probation for the criminal conviction, Widera was transferred to St. Andrews

in Delavan, Wisconsin. *Id.* at 428. Widera was allowed to work with children there, and in a matter of months after the criminal conviction, letters were written by the St. Andrews school board and St. Andrews parishioners to the Milwaukee Archdiocese, praising Father Widera's abilities with children. *Id.* The Milwaukee Archdiocese responded to each of these letters, but did not disclose Widera's conviction or other reports of possible child molestations. *Id.*

On June 29, 1976, more allegations were made against Widera. The Milwaukee Archdiocese's ombudsmen's notes of June 29, 1976 state:

> Archbishop called – Mike Short, a therapist in Elkhorn, had called in to Bob Sampon - Short is a counselor and now advocate for [redacted text]. She reported to Short that her son had been sexually molested by Fr. Widera while on a weekend fishing outing - Son is [redacted name] age 13, an altar boy at Parish. Archbishop suggested I call Widera first, then Short, assuring complainants that W. will be removed from Parish and will receive in-patient treatment, if necessary.

Id. at 428-29. The ombudsman's July notes contain Widera's admission that he made "a slip." *Id.* at 429. The ombudsman told Father Widera that he would "try to keep the lid on the thing, so no police record would be made," but advised him that he would probably would be transferred and would require in-patient treatment. *Id.* The ombudsman then contacted Short, who indicated he would contact the victim's mother and "convince her not to act with police, if Church

removes W. from parish, and gets him help, as well as counsels the boy." *Id.* The ombudsman also advised Widera he would be transferred from St. Andrews at the conclusion of his probation, and told Widera to stay away from several other boys Father Widera had been seen with. *Id.*

On August 20, 1976, Father Eugene B. Henke, pastor of St. Andrews, reported an allegation regarding Widera to the Archdiocesan Personnel Board. The Archdiocesan Personnel Board notes state: "8/20/76 - telephone - E. Henke - informed that S. Widera has had an incident with an 11 year old boy a couple of months ago." *Id.* It was not clear whether the allegations reported by Henke were the same as those reported to the ombudsman by Short. *Id.*

C. Widera Goes "On Vacation" To California And Takes Faculties In Orange.

On the same day, August 20, 1976, the ombudsman spoke with both Widera and Henke. The ombudsman wrote "Called Henke and Widera - they agreed that W. would go 'on vacation' (California!) ...[Widera] would be transferred. W. should tell people only that he's going on vacation." *Id.* On August 23, 1976, the ombudsman informed Archbishop Cousins of the "developments," and Widera soon left for California. *Id.* On August 27, 1976, the ombudsman wrote:

> Approached Esser about above – the Personnel Board has heard nothing from anyone - Archbishop has *not* spoken to Personnel Board about this matter. – However, Paul [Esser] would have a problem

> in conscience to re-assign Siegfried - when? And should they really - in view of Widera's record???

Id. at 429-30. On October 29, 1976, John Waldbauer, the executive secretary of the Archdiocesan Personnel Board sent Widera a letter, stating:

> The Personnel Board recommends a choice. First, that you pursue significant counseling to assist you in coming in touch with yourself about the action that has brought about a hasty exit from your last two assignments. . . Subsequent to such therapy, you would be considered for an appointment within the Archdiocese. The alternative would be for you to be released to the services of another diocese; with the permission of the Archbishop, you would request to minister elsewhere. Should you select the second alternative, the Board would ask periodic reports about your status.

Id. at 430. On December 3, 1976, Archbishop Cousins told the Archdiocesan Personnel Board that "S. Widera–will spend some time with his parents in Florida and then go to California to continue psychotherapy" and that Cousins "plans to contact Bishop Johnson of Orange to see if there might be something available for Widera." *Id.* Cousins' authorization was necessary for Widera to work as a priest outside of the Milwaukee Archdiocese. *Id.* On December 17, 1976, Cousins told the board that he had "called Bishop Johnson in Orange about possibility for S. Widera." *Id.*

On December 20, 1976, Cousins sent a letter to the bishop of the Orange Diocese, Bishop William Johnson, and the Chancellor/Secretary of the Orange Diocese, Father Michael Driscoll:

> A few days ago I talked by phone to Bishop Johnson about a possible pastoral assignment for Father Siegfried Widera of this Archdiocese. The conversation was very general and the Bishop suggested that perhaps something could be done on a temporary basis. My reason for approaching Bishop Johnson is founded in the fact that Father Widera's brother and family live in Costa Mesa, California. . . .
>
> Father Widera was ordained in 1967 and has done good work for the Diocese in the places to which he was assigned. In his earlier years there was a moral problem having to do with a boy in school. This seemed adequately confronted through treatment and an intense desire upon Father's part to avoid any repetition of a previous offense.
>
> More recently, however, there has been a repetition, and according to our State Laws further psychiatric treatment is mandated with the strong recommendation that no immediate assignment be made in the environs of the Archdiocese.

> Father Widera has cooperated in every way and is presently under treatment. His doctor is somewhat in favor of his leaving the scene but expects that there will be continuing treatment. This has already been arranged and a doctor in California will take over at this point. From all the professional information I can gather there would seem no great risk in allowing this man to return to pastoral work, but there are legal complications at present writing. Incidentally, these legal technicalities would permit Father's going to another State as long as treatment is continued. . . .
>
> There is no thought of incardination involved, and I am quite willing to accept the man back into the Archdiocese whenever circumstances would indicate. Though I anticipate no recurrence of this past aberration, I would certainly want to be informed if the slightest suspicion were to develop. I would like to show fraternal charity to a fellow priest but I cannot be virtuous at the expense of a fellow bishop.

Id. at 430-31. On January 10, 1977, Widera was appointed as an associate pastor at St. Pius V Parish in Orange County, California. *Id.* at 431. On January 25, 1977, Archbishop Cousins sent a letter to Father Widera, confirming his temporary assignment in California:

> According to our earlier conversations, your stay in California will be determined by the

> doctor recommended to you before your departure and to whom I confidently trust you have committed yourself for necessary help. Treatment is important to you and essential to your future assignment, but I have every reason to believe that you will accept this condition and work towards an early return.

Id. The same day, Archbishop Cousins also sent a letter to Bishop Johnson, confirming that Father Widera would remain a member of the Milwaukee Archdiocese and stating:

> Permit me to express my sincere thanks to you and those involved for this consideration of a priest who has done good work and whose absence from the Diocese is predicated upon the local situation discussed in earlier letters. I fully expect that upon the recommendation of those professionally helping him at the present time he will be reassigned in our Archdiocese.

Id. During the period in which Widera worked in California but was incardinated in Wisconsin, he remained subject to the jurisdiction, authority, and control of the Archbishop of Milwaukee. The Archbishop of Milwaukee had the authority to recall Widera to Wisconsin, to remove his faculties as a priest, to investigate whether he had committed acts of molestation, and to petition the Pope to laicize him. *Id.* at 432.

D. Widera Is Excardinated From the Milwaukee Archdiocese And Incardinated In The Orange Diocese.

In late 1981, Widera sought incardination into the Orange Diocese. *Id.* Letters were written back and forth regarding Widera's excardination from the Milwaukee Archdiocese and incardination to the Orange Diocese. *Id.* None of the correspondence from the Milwaukee Archdiocese mentioned Widera's criminal conviction. *Id.* at 433. Widera's decree of incardination in the Orange Diocese stated the diocese was "officially advised that you [Widera] have [received] a decree of excardination from the Archdiocese of Milwaukee *with assurance of your good character, your course of studies and your good example.*" *Id.* (italics in original).

In July 1985, Widera was transferred to St. Martin de Porres in Yorba Linda. Shortly thereafter, Widera started sexually molesting Paino, an eight-year old boy who attended St. Martin. *Id.*

3. Proceedings Below.

Paino sued the Milwaukee Archdiocese in California for its complicity in intentionally transferring this known pedophile into California. On a motion to quash the service of the complaint filed by the Milwaukee Archdiocese, the trial court held that "the evidence is certainly sufficient to show that the Archdiocese of Milwaukee chose to place this troublesome member of its clergy here in California as a sort of lend-lease program with the hope that he would be out of their sight and out of their jurisdiction." *Id.* at 438. The trial

court denied the motion. The Milwaukee Archdiocese then filed a writ with the California Court of Appeal.

In its Petition for Writ of Mandate, the Milwaukee Archdiocese presented a single issue to the California Court of Appeal: "The single issue presented in this petition is whether Paino met his burden of proof of establishing sufficient contacts between the Archdiocese of Milwaukee and California relating to the real party in interest's causes of action such that the Archdiocese of Milwaukee was subject to personal jurisdiction." *See* Real Party-In-Interest's Appendix, at A-1. The Archdiocese did not mention or present any issue relating to the First Amendment in its opening brief.[1]

Based on the facts discussed above, the Court of Appeal found that the Archdiocese purposefully availed itself of the jurisdiction of California, and therefore, was subject to

---

[1] The Milwaukee Archdiocese only mentioned the First Amendment in its reply brief in passing in a single footnote:

> Paino's attempts to bind the Archdiocese of Milwaukee to Widera's contacts with California . . . would require this Court to review and interpret Canon Law for the religious effect of incardination in the Roman Catholic Church. This Court is prohibited under the First Amendment from undertaking such an analysis. *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). This is [sic] no way prohibits the Court from determining whether personal jurisdiction exists in this case.

See Real Party-In-Interest's Appendix, at A-4 n.2.

the jurisdiction of California. *Id.* at 426. The California Supreme Court subsequently denied review of the California Court of Appeal decision.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Court of Appeal Did Not Make The Factual Findings Set Forth In Milwaukee's "Questions Presented."

In its Petition, the Milwaukee Archdiocese sets forth the following Questions Presented:

1. Does the First Amendment prohibit California from exercising specific personal jurisdiction over the Milwaukee Archdiocese *based solely on the Archdiocese's religious authority to deny Father Widera the right to employment by the Diocese of Orange*?

2. Does the Due Process Clause permit California to exercise specific personal jurisdiction over the Archdiocese of Milwaukee because *the Archdiocese failed to prevent or hinder Father Widera from accepting employment from the Diocese of Orange* where it was foreseeable that Father Widera might commit a specific type of tort while employed by the Diocese of Orange?

Thus, according to the Milwaukee Archdiocese's Questions Presented, the California Court of Appeal ruled that California could exercise jurisdiction over the Milwaukee

Archdiocese based solely on the fact that the Milwaukee Archdiocese had the religious authority to deny Father Widera the right to employment by the Diocese of Orange, but that the Milwaukee Archdiocese failed to prevent Father Widera from accepting that employment. These Questions Presented completely mischaracterize the findings by the Court of Appeal.

The Court of Appeal did not make any factual finding, or even discuss, the fact that the Archdiocese had the "religious authority to deny Father Widera the right to employment by the Diocese of Orange." Likewise, the Court of Appeal did not hold that the California courts could exercise jurisdiction over the Milwaukee Archdiocese because the Archdiocese "failed to prevent Father Widera from accepting employment from the Diocese of Orange." Instead, the Court of Appeal ruled that affirmative actions by the Archdiocese subjected it to California's jurisdiction:

> The evidence supports the conclusion the Milwaukee Archdiocese intentionally sent Widera to California to get him out of Wisconsin where he had been convicted of sexual perversion against a boy and could create further problems for the Milwaukee Archdiocese. . . . The evidence supported the conclusion the Milwaukee Archdiocese knew Widera was a pedophile and posed a serious threat of sexually abusing boys in California. By sending a known pedophile into California, the Milwaukee Archdiocese aimed its intentional conduct directly at this state. The brunt of the harm, indeed all of the harm,

> resulted in California. Having sent Widera into California knowing he was a convicted child abuser and a pedophile, the Milwaukee Archdiocese reasonably could expect to be haled into court in California to answer for the consequences of its actions.

Id. at 438. This Court cannot answer the Questions Presented by the Milwaukee Archdiocese. The Questions Presented are merely hypothetical questions because they are based on factual findings neither made nor relied upon by the Court of Appeal in ruling that California can exercise personal jurisdiction over the Milwaukee Archdiocese. A ruling on the Milwaukee Archdiocese's Questions Presented would only be an advisory opinion by this Court.

2. The Petitioner's Real Quibble Is That The Court Of Appeal Erred In Interpreting The Facts Of This Case.

The Milwaukee Archdiocese's real argument is that the Court of Appeal misinterpreted the facts in finding that the Milwaukee Archdiocese purposefully availed itself of California's jurisdiction. Throughout the Petition, the Milwaukee Archdiocese tries to argue that: (1) Milwaukee did not send Father Widera to California (Petition, p. 16); (2) Milwaukee did not direct Father Widera to travel to California (Petition, p. 25); (3) Milwaukee did not direct Father Widera to seek employment with the Diocese of Orange (Petition, p. 25); (4) Father Widera chose to seek employment with the Diocese of Orange (Petition, p. 25); (5) Widera chose California because he had family there (Petition, p. 16); and (6) Milwaukee only failed to prevent or hinder Father Widera

from accepting employment from the Diocese of Orange (Petition, p. 21).

As discussed above, the Court of Appeal made factual findings to the contrary:

> As part of his sentence for sexual perversion, Widera was ordered not to return to the Port Washington, Wisconsin area. Henke, the pastor of St. Andrew's Parish, wanted Widera removed. Concerns were raised over whether Widera could "in conscience" be reassigned within the Milwaukee Archdiocese "in view of Widera's record." A cover story was created: Widera would go " 'on vacation' " to California. In the ombudsman's notes, the words "on vacation" were set off by quotation marks. When asked why he was leaving, Widera was instructed to say "only that he's going on vacation." After going to California, Widera wrote: "It was on advice that I left the area."
>
> Once Widera was in California, the Milwaukee Archdiocese never recalled him, although it had the power to do so, never questioned him, never monitored his treatment, and never conducted an investigation to determine whether he continued to molest boys. The Milwaukee Archdiocese allowed Widera to be excardinated so he could be incardinated in the Orange Diocese. . . . [Thus,] the evidence

> supports the finding that the Milwaukee Archdiocese made and enacted a concerted plan to rid itself of Widera by intentionally placing him in California.

Id. at 439.

Rule 10 of the Rules of Supreme Court states that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule." This Court generally does not reexamine the state court's findings and conclusions of fact:

> No statute or rule governs our review of facts found by state courts [on direct review of state-court judgments]. The reasons justifying a deferential standard of review in other contexts, however, apply with equal force to our review of a state trial court's findings of fact made in connection with a federal constitutional claim. Our cases have indicated that, in the absence of exceptional circumstances, we would defer to the state-court factual findings, even when those findings relate to a constitutional issue. [citations omitted]. Moreover, "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question.

Hernandez v. New York, 500 U.S. 352, 366 (1991) (citing *Miller v. Fenton*, 474 U.S. 104, 113 (1985)).

Here, the Court of Appeal's factual findings are clearly supported by the evidence that the Milwaukee Archdiocese sought to rid itself of Father Widera by sending him into California knowing he was a pedophile. Thus, even though the factual findings by the Court of Appeal relate to the constitutional issue of due process, this Court should defer to those Court of Appeal's findings.

What the Milwaukee Archdiocese really wants this Court to do is to overrule the Court of Appeal's factual findings, find that the Archdiocese was not complicit in transferring a known pedophile into California, and find instead that the only thing the Archdiocese did was fail to prevent Father Widera from accepting employment from the Diocese of Orange. Not only should this Court refuse to overrule the Court of Appeal's factual findings out of deference to that court, but also because the evidence does not even support those conclusions.

3. Neither The Decision Nor The Record Below Raises The First Question Presented In the Petition.

The Milwaukee's first Question Presented is whether "the Free Exercise Clause of the First Amendment prohibits a state from exercising specific personal jurisdiction over a non-resident religious organization based solely on its religious authority to deny its clergy the right to employment by a separate religious organization residing in the state."

The Court of Appeal did not decide that question in this proceeding. In fact, nowhere does the Court of Appeal address any First Amendment argument.

The Milwaukee Archdiocese says in its Petition that it argued before the Court of Appeal that "its religious authority over Widera could not provide California with a basis for the exercise of jurisdiction consistent with the First Amendment," but that the Court of Appeal ignored this argument. Petition, p. 18, n.8. This just is not true. The Milwaukee Archdiocese did not present any issue relating to the First Amendment in its opening brief, and only mentioned the First Amendment in passing in a single footnote in its reply brief. *See* Real Party-In-Interest's Appendix, at A-1 & A-2.

The Milwaukee Archdiocese bears the burden of establishing affirmatively that it properly presented the First Amendment issue in the state courts. *See e.g., Adams v. Robertson*, 520 U.S. 83, 88-89 & n.3 (1997) (to obtain review of a state court decision, the petitioner must specifically set up or claim a federal right, in a proper manner, in accordance with the applicable state procedural law; "passing invocations" are insufficient); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 n.9 (1987) (a casual reference to a federal case is insufficient to inform a state court that it has been presented with a federal claim).

In California, "[a] party's failure to raise an issue below and in its opening brief constitutes a waiver." *Nemarnik v. Los Angeles Kings Hockey Club*, 103 Cal. App. 4th 631, 638 n. 3, 127 Cal. Rptr. 2d 10 (2002); *Tiernan v. Trustees of Cal. State University & Colleges*, 33 Cal. 3d 211, 216 n. 4, 188 Cal. Rptr. 115 (1982) (failure to raise issue on

appeal constitutes waiver); *Locke v. Warner Bros., Inc.*, 57 Cal. App. 4th 354, 368, 66 Cal. Rptr. 2d 921 (1997) (failure to raise issue in opening brief waives issue on appeal, even if raised in the reply brief).

The Archdiocese failed to meet its burden of showing that the First Amendment issue was properly presented to the California Court of Appeal. Therefore, this Court should decline to consider that Question Presented.

Moreover, contrary to what the Milwaukee Archdiocese now argues, a civil court can independently examine the structure and operation of a religious entity in ruling on a personal jurisdiction issue without violating the First Amendment. *General Council v. Superior Court of California*, 439 U.S. 1355, 1356, 99 S. Ct. 35, 26 (1978). In *General Council*, several retirement home residents filed a class action suit in California involving the financial collapse of Pacific Homes, Inc., the operator of the retirement homes. The residents sued a United Methodist Church organization, alleging that Pacific Homes was the alter ego, agency, or instrumentality of the that religious organization. The Methodist organization moved to quash the service of the complaint, arguing that California could not exercise personal jurisdiction over it.

In a request for stay, the Methodist organization argued to the United States Supreme Court that the lower court violated its First Amendment rights in basing its assertion of jurisdiction on the residents' characterization of the organization's role in the structure of the United Methodist Church, and rejecting contrary testimony of church officials and experts and statements set forth in the Book of

Discipline. *General Council*, 439 U.S. at 1370. Justice Rehnquist rejected this argument *in dicta*:

> In my view, [the Methodist organization] plainly is wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units in an action such as this. There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. [citations omitted]. But this Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes.

General Council, 439 U.S. at 1372-73. Thus, the civil court in this case was permitted to look to the Catholic church organization and structure to determine this personal jurisdiction issue.

Additionally, the Milwaukee Archdiocese should be estopped from even raising a First Amendment argument in light of the fact that the Milwaukee Archdiocese itself relied on canon law to try to argue that it had no contact with the State of California. For example, the Milwaukee Archdiocese argued that "Under canon law, priests cannot be incardinated in two dioceses at the same time. Therefore, the proper canonical process was undertaken to effect this transfer of incardination." *See* Real Party-In-Interest's Appendix, at A-

2. The Milwaukee Archdiocese should not be permitted to argue on one had that the Court of Appeal cannot review or interpret canon law to determine the structure and actual operation of the church, and then use canon law to support its position.

4. The Decision By The California Court Of Appeal Is Consistent With The Decisions Of This And Other Courts.

Personal jurisdiction questions generally tend to depend on the particular facts of each case. *General Council v. Superior Court of California*, 439 U.S. 1355, 1373, 99 S. Ct. 35, 39 (1978). As stated by Justice Rehnquist, "only a marked departure by a lower court in the application of established law would persuade four Justices to grant certiorari." *Id.*

In this case, the Court of Appeal wrote a 20 page published opinion. The Court of Appeal spent a great deal of time outlining all of the facts showing the Archdiocese's contacts with California, demonstrating how the Archdiocese engaged in intentional conduct expressly aimed at California, and showing just how the Archdiocese knew its conduct would cause harm in this state. There is no indication in this case that the Court of Appeal failed to apply the due process standards enunciated in this Court's decisions.

The Milwaukee Archdiocese tries to argue that the Court of Appeal distorted the "effects" test set forth by this Court in *Calder v. Jones*, 465 U.S. 783 (1984). The Archdiocese says that the Court of Appeal improperly used the "effects" test by finding that the Archdiocese's conduct --

failing to prevent Father Widera from being employed by the Orange Diocese and failing to take action to prevent possible future harm – was expressly aimed at or targeted California. Petition, p. 5.

Contrary to what the Archdiocese tries to say, the Court of Appeal did properly apply this Court's "effects" test.

> Under the "effects" test for determining purposeful availment, a defendant might be subject to jurisdiction in the forum state if the defendant engaged in intentional conduct "*expressly aimed at or targeting* the forum state," and the defendant knew the intentional conduct would cause harm in the forum.

Milwaukee, 112 Cal. App. 4th at 436 (citing *Pavlovich v. Superior Court*, 29 Cal. 4th 262, 127 Cal. Rtpr. 2d 329 (2002)). The Court of Appeal went on to discuss the "effects" test:

> The *Pavlovich* court recognized the lack of uniformity in applying the *Calder* test. [citation omitted]. In particular, the *Pavlovich* court acknowledged that courts have struggled over whether *Calder* stands for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. . . . The *Pavlovich* court reviewed federal and out-of-state cases and concluded, "virtually every jurisdiction has held that the *Calder* effects test requires intentional conduct *expressly*

> *aimed at or targeting* the forum state in addition to the defendant's knowledge that his intentional conduct would cause harm in the forum." [citation omitted]. The *Pavlovich* court "join[ed] with those jurisdictions that require additional evidence of express aiming or intentional targeting."

Milwaukee, 112 Cal. App. 4th at 437-38. The Court of Appeal went on to apply the test enunciated in *Pavlovich* by holding that the Milwaukee Archdiocese engage in intentional conduct expressly aimed at or targeting California, knowing the intentional conduct would cause harm in this state. "The evidence supports the conclusion the Milwaukee Archdiocese intentionally sent Widera to California to get him out of Wisconsin where he had been convicted of sexual perversion against a boy and could create further problems for the Milwaukee Archdiocese." *Id.* at 438.

Moreover, the Court of Appeals held that the Archdiocese knew that its conduct in sending this known pedophile into California would harm California residents:

> The nature of the Milwaukee Archdiocese's conduct--sending a pedophile priest directly into California--meant the Milwaukee Archdiocese's conduct *would* harm California residents. In other words, the Milwaukee Archdiocese's conduct targeted a known group of California residents--boys, specifically, Roman Catholic boys-- as a means of getting

> Widera out of the Milwaukee Archdiocese. Such targeting is, we believe, sufficiently individualized to satisfy due process because the Milwaukee Archdiocese could reasonably anticipate being haled into court in California.

Id. at 440. This holding falls squarely within this Court's "effects" test set forth in *Calder.*

The Court of Appeal's decision is also consistent with cases from other states in which out-of-state dioceses intentionally transferred molesters into the forum states. For example, in *John Does 1-9 v. CompCare, Inc.*, 52 Wash. App. 688, 697-98, 763 P. 2d 1237 (1988), a Washington court found in personam jurisdiction over an out-of-state diocese for moving a known pedophile priest into the State of Washington. That court found personal jurisdiction based on the facts that the out of state diocese ordered the priest to leave the geographical area of the out-of-state diocese because of molestations; the out-of-state diocese approved the decision that the priest would reside in Washington; the out-of-state diocese placed the priest in a Jesuit House where he could be in an atmosphere that would either support him or keep him from being involved with young people; and the out-of-state diocese maintained the priest in Washington because of his pedopiliac problem. The court held that the out-of-state diocese purposefully availed itself of the privilege of conducting activities within Washington. *Id.* at 698-99.

Similarly, in *Doe 1-22 v. Roman Catholic Bishop of Fall River*, 509 N.W. 2d 598, 600 (Minn. 1993), a Minnesota court held that minimum contacts were present when an out-of-state diocese authorized an intermediary to assign a priest

to parish work in the forum state even though the out-of-state diocese was aware of the priest's pedophilia.

As seen by these cases, forum states have exercised jurisdiction over out-of-state dioceses which send molesting priests into the forum states.

The Milwaukee Archdiocese pointed to another sister state case where that court refused to exercise jurisdiction over an out of state diocese, the case of *Doe v. Roman Catholic Diocese of Boise, Inc.*, 121 N.M. 738 (Ct.App.New Mexico 1996)). However, as stated by the California Court of Appeal, the out of state diocese in that case "played no part in the priest's decision to settle in New Mexico, but only granted the priest permission to leave Idaho." As the Court of Appeal noted,

> Here, in stark contrast, the Milwaukee Archdiocese did not merely approve a request to work outside the Milwaukee Archdiocese or acquiesce in Widera's move. Rather, the evidence supports the finding the Milwaukee Archdiocese sought to rid itself of Widera by intentionally sending him into California.

Milwaukee, 112 Cal. App. 4th at 440-41.

In conclusion, the Court of Appeal decision comports with the laws of this Court and other states as well.

CONCLUSION

No reason exists why the Milwaukee Archdiocese's Petition for Writ of Certiorari should be granted. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 19th day of May, 2004.

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APPENDIX

INDEX

Page

A. Excerpts from page 8 of Verified Petition for Writ of Mandate filed by the Archdiocese of Milwaukee Before the California Court of Appeal A-1

B. Excerpts from pages 13 - 15 of Petitioner's Reply To Real Party-In-Interest's Opposition to Petition for Peremptory Writ of Mandate filed by the Archdiocese of Milwaukee Before the California Court of Appeal ..... A-2 thru A-4

have such systematic and continuous contacts with California such that it was subject to general jurisdiction in California (PA 01082). Nonetheless, the respondent court denied the Archdiocese of Milwaukee's motion to quash. The respondent court did not city any factual basis to support a finding that the Archdiocese of Milwaukee had any contacts with the State of California, much less sufficient contracts relating to real party in interests's claims, such that the Archdiocese of Milwaukee was subject to the specific jurisdiction of the court for this particular case. (PA 01083-1095).

Basis for Writ Relief

10. The single issue presented in this petition is whether Paino met his burden of proof of establishing sufficient contacts between the Archdiocese of Milwaukee and California relating to the real party in interest's causes of action such that the Archdiocese of Milwaukee was subject to personal jurisdiction.

11. With all due respect to the respondent court, the Archdiocese of Milwaukee contends that this burden was not met for the reasons previously described and for the reasons more fully described below.

Wisconsin and located in Milwaukee, Wisconsin. (PA00003). It is a separate and distinct religious incorporated entity from the Roman Catholic Bishop of Orange ("Diocese of Orange"), which is a religious corporation organized under the laws of California. The Archdiocese of Milwaukee is presided over by a different bishop or archbishop than the Roman Catholic bishop of Orange. The Archbishop of Milwaukee exercises no control or influence over the activities of the Diocese of Orange. (PA 00061-62 at ¶¶ 2-3).

In October of 1981, the Diocese of Orange informed the Archdiocese of Milwaukee that Widera was seeking to be incardinated into the Diocese of Orange. The Diocese of Orange had approved this request. Under Canon Law, priests cannot be incardinated in two dioceses at the same time. Therefore, the proper canonical process was undertaken to effect this transfer of incardination. Once a priest is incardinated in a new diocese, all of his relationships, obligations and connections with the former diocese cease. Four years before the alleged abuse, Widera had severed all canonical or other connections with the Archdiocese of Milwaukee. The Archdiocese of Milwaukee had no control

over or obligation concerning Widera in any respect. (PA 00063 at ¶ 9).

The relevant period during which the minimum contact analysis must occur is when the cause of action arose rather than when the complaint was filed or served. Boaz v. Boyle & Co., 40 Cal. App. 4th 700, 717 (1995). Paino cannot point to any contacts by the Archdiocese of Milwaukee in 1985, when the alleged abuse occurred - - in fact, Paino's opposition brief does not include a single contact at all by the Archdiocese of Milwaukee with California for any time from 1982 to 1985, and virtually none before that. (See pg. 21, infra).

Any revocation of Widera's faculties to act as a priest in California must come from the Diocese of Orange, not the Archdiocese of Milwaukee (PA 00966). The Archdiocese of Milwaukee did not have the ecclesiastical authority to control Widera's priestly activities in California. Further, Widera's temporal needs were provided by the Diocese of Orange. As these temporal needs were met, the Archbishop from Milwaukee had no further duties to Widera while he was in

California, even while he was incardinated[2] with the Archdiocese of Milwaukee. (PA 00952-954 at 35:20-25, 36:1, 41:22-25, 42:1-4).

5. The Archdiocese of Milwaukee did not Have Jurisdiction, Control and Authority Over Widera While he was in California.

Paino's record citations that the Archdiocese of Milwaukee had "jurisdiction, control and authority" over Widera while he was in California are misleading and lack candor. Paino ignores the following record citations:

1. The Diocese of Orange admitted that the authority of a spiritual leader of one diocese is limited to its territorial boundaries. (PA 00930 at 39:22-25; 40:1-8).

2

Paino's attempts to bind the Archdiocese of Milwaukee to Widera's contacts with California are inappropriate. It would require this Court to review and interpret Canon Law for the religious effect of incardination in the Roman Catholic Church. This Court is prohibited under the First Amended from undertaking such an analysis. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). This is no way prohibits the Court from determining whether personal jurisdiction exists in this case. The Court should review the Archdiocese of Milwaukee's contacts with California, not the religious significance of incardination. In any event, Widera was excardinated many years before the alleged abuse at issue.